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Article

COLLATERAL REMEDIES IN CRIMINAL CASES IN MARYLAND: AN ASSESSMENT

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I. INTRODUCTION

In this Article, I describe and evaluate the major collateral remedies in Maryland that are available to prisoners to challenge unlawful convictions and sentences: the writ of habeas corpus,[1] a motion to correct an illegal sentence,[2] and a postconviction proceeding.[3] By "collateral," I mean the process that begins upon completion of direct review.[4] The state's Uniform Postconviction Procedure Act (PCPA) provides the primary remedy.[5] Additional remedies include proceedings based on newly discovered evidence[6] and on DNA evidence,[7] and, for persons who are not in or under custody, the writ of error *coram nobis*.[8]

The collateral process is a vital part of our criminal justice system. When important facts exist outside the trial record, the collateral pro-

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1. *See infra* Part III.A.

2. *See infra* Part III.B.

3. *See infra* Part III.C.

4. *See generally* 1 DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF § 1-5, at 18 (2001). Wilkes refers to this process as the "postconviction" process. I use the word "collateral" to avoid confusion. In Maryland, there is a "postconviction" process, but it is but one of several collateral remedies. Wilkes notes that recently "there have been some inroads on the principle that postconviction proceedings are to be postponed until after the direct review proceedings are completed or unavailable." *Id.* Wilkes cites Texas as an example, where, in death penalty cases, postconviction habeas corpus cases "run concurrently" with direct appeals. *Id.*; *see* 2 WILKES, *supra*, app. A at 640 (citing James C. Harrington & Anne More Burnham, *Texas's New Habeas Corpus Procedure for Death-Row Inmates: Kafkaesque—and Probably Unconstitutional*, 27 ST. MARY'S L.J.69, 89-90 (1995)). Texas law requires any application for a writ of habeas corpus to be filed within 180 days of the appointment of counsel by the convicting court or within 45 days of the date the state's brief is filed with the court of criminal appeals. TEX. CODE CRIM. PROC. ANN. art. 11.071(4)(a) (Vernon 2005).

5. MD. CODE ANN., CRIM. PROC. §§ 7-101 to -301 (2004). *See generally* Edward A. Tomlinson, *Post-Conviction in Maryland: Past, Present and Future*, 45 MD. L. REV. 927, 934 (1986).

6. *See infra* Part IV.C.2.a.

7. *See infra* Part IV.C.2.a.

8. *See infra* note 85.

cess is usually the sole means by which a convicted person can enforce fundamental fair-trial rights, for example, to the effective assistance of counsel,[9] to obtain exculpatory evidence,[10] and to a jury trial (absent a knowing and intelligent waiver).[11]

I begin, however, by describing the substantial federal disengagement in this area, which enhances the importance of the state's collateral remedies. The retrenchment in federal habeas corpus in the last fifteen years has been extraordinary.[12] At the direction of Congress and the United States Supreme Court, the federal judiciary now plays an extremely limited role in protecting the federal constitutional rights of state prisoners.[13] Today, it is the state's courts to which a person who is wrongfully convicted in Maryland must primarily look for relief, not only as a first resort, but often effectively as the last resort. It is good, therefore, that Maryland's system of collateral remedies is strong and comprehensive in many respects.

The General Assembly has rejected proposals to import restrictive provisions of federal law into the state's postconviction statute,[14] per-

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9. Johnson v. State, 292 Md. 405, 434-35, 439 A.2d 542, 559 (1982). *But see In re* Parris W., 363 Md. 717, 726, 770 A.2d 202, 207 (2001) (noting that although the "general rule [is] that a claim of ineffective assistance of counsel is raised most appropriately in a postconviction proceeding . . . [, this rule] is not absolute and, where the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim, there is no need for a collateral fact-finding proceeding, and review on direct appeal may be appropriate and desirable" (citing Harris v. State, 299 Md. 511, 517, 474 A.2d 890, 893 (1984))).

10. Conyers v. State, 367 Md. 571, 595, 790 A.2d 15, 29 (2002) (holding that a postconviction hearing is the appropriate venue to challenge a violation of a defendant's right to obtain exculpatory evidence if he had no way of knowing about the evidence sooner); *accord* Wilson v. State, 363 Md. 333, 768 A.2d 675 (2001).

11. Smith v. Director, Patuxent Inst., 13 Md. App. 53, 280 A.2d 910 (1971) (granting, in a postconviction proceeding, an applicant's challenge to the waiver of right to a trial by jury).

12. *See infra* Part II.B.

13. The most dramatic action of Congress was its enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the United States Code). *See generally* 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE app. a (4th ed. 2001) (providing a detailed account of AEDPA amendments of Title 28 of the United States Code). Before 1996, however, the Supreme Court had restricted the use of federal habeas corpus in a series of decisions. *See infra* Part II.B.

14. For example, see Act of May 24, 1991, ch. 499, 1991 Md. Laws 2992, 2992-99, in which the General Assembly rejected proposed amendments to Article 27, § 645A. These amendments, inter alia, would have:

(1) Barred, with narrow exceptions, any retroactive application of new rules in postconviction proceedings. *Id.* at 2997 (This is the federal habeas rule initially established in *Teague v. Lane*, 489 U.S. 288 (1989).)

(2) Reversed the current waiver rule for claims based on "fundamental" rights with the easier-to-satisfy federal habeas waiver rule. 1991 Md. Laws at 2996-97; *see also* Coleman v.

haps in recognition that the federal retrenchment calls for exactly the opposite: an invigorated state check on the federal process.[15]

Maryland's judiciary has maintained a balance among the various collateral remedies and used them especially to enforce the right to the effective assistance of counsel (the predicate to a fair trial),[16] and a group of rights deemed "fundamental" for purposes of the PCPA.[17]

Maryland's current Governor has reestablished the time-honored policy of considering for parole and clemency prisoners who have been sentenced to life with parole, at least in a limited way.[18] This is an important part of the state's criminal justice system.

I believe there is a problem, however, that Maryland's appellate courts can address within the framework of the existing PCPA. It is the overuse of the "waiver" doctrine in circumstances in which the policies that support the doctrine do not apply. Maryland's courts, like most others, rarely resolve postconviction claims on the merits, usually finding that the petitioner's lawyer waived the claim by failing to preserve the error at trial, on appeal, or in an initial postconviction proceeding. What I find extremely troubling is that the substantial majority of these attorney "waivers" are inadvertent; most are the product of negligence, but not the gross negligence which, when coupled with prejudice, qualifies as actionable "ineffective assistance of counsel."[19] They do not reflect conscious strategic judgments or, for that fact, any judgment at all. In these many cases, we accept attorney negligence as a basis to sustain convictions, lengthy incarceration, and even state-imposed executions.

Thompson, 501 U.S. 722, 750 (1991) (requiring a petitioner to show "cause for the default and actual prejudice as a result of the alleged violation [of law that the petitioner wishes to assert]"). The current rule is that the claim is not waived unless the petitioner personally and "intelligently and knowingly" fails to assert the claim and could have asserted the claim, in an earlier proceeding. *See infra* Part III.C.1.h.

(3) Created a 3-year statute of limitations for noncapital postconviction claims and a 180-day period for capital claims. 1991 Md. Laws at 2995; *see also infra* Part III.C.1.d.

15. *See infra* Part II.D.

16. *See infra* note 234.

17. *See infra* Part III.C.1.h(1) (waiver limited to fundamental rights).

18. *See* Lomax v. Warden, 356 Md. 569, 573, 741 A.2d 476, 478 (1999) (describing the decision of former Governor Paris Glendening to generally stop considering for parole prisoners sentenced to life imprisonment). Governor Robert Ehrlich has reinstated the traditional policy of Maryland Governors to use the commutation, clemency, and parole-approval powers to mitigate punishment where warranted. As of March 1, 2005, he had granted commutations to, or approved parole for, four life-sentenced prisoners and three prisoners sentenced to twenty-five years without parole. This information was provided to the author by Chrysovalantis Kefalas, Deputy Counsel to Governor Robert L. Ehrlich, Jr.

19. *See infra* note 234.

Clearly, the waiver rules are supported by state interests in finality and judicial economy, and sometimes by fairness to victims and their families. However, the reflexive invocation of these rules when they do not serve the underlying policies gives our criminal justice system the quality of a lottery by too often basing the ultimate determination of who goes free and who goes to prison not on defendants' relative culpability, but rather on the quality of their lawyers.

Although revisions in the waiver rules cannot wholly resolve this structural problem, they can address it in important ways. There is a now-dormant provision of the PCPA that excuses waiver when the petitioner can demonstrate that "special circumstances" justify excuse.[20] I argue that Maryland's courts ought to use this provision, as the General Assembly intended, to excuse waivers. I offer two limited examples: (1) when the failure to make an argument was due to a reasonably unforeseeable interpretation of law,[21] and (2) in extraordinary cases, when the petitioner makes an adequate showing of factual innocence.[22] I do not mean, however, to suggest that these are the only potential uses of the "special circumstances" exception. Rather, the test is an equitable, context-specific one that should be satisfied when the policies underlying waiver do not apply.

I address two other issues under the PCPA: (1) whether it entitles litigants to conduct discovery (although this is a novel issue, I believe the PCPA authorizes courts, in their discretion, to order limited discovery, including depositions);[23] and (2) the meaning of the "interests of justice" standard that governs a court's decision whether to reopen a postconviction proceeding (its text, legislative history, and the chief decision interpreting it give it a broad, open-ended meaning).[24]

The judicial role in collateral cases is a difficult one. Many cases involve successive petitions, and in most of these cases, the petitioners proceed pro se. It is sometimes impossible to understand arguments and to determine whether the petitioner has previously presented them to a court. If there are appendices, they are often unorganized and unintelligible. In cases in which the convictions are old—sometimes two or three decades old—the basic records may be unavailable.[25] This, itself, is a serious problem that needs to be addressed.[26]

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20. MD. CODE ANN., CRIM. PROC. § 7-106(b)(1)(ii) (2004).

21. *See infra* Part IV.C.2.b.

22. *See infra* Part IV.C.2.a.

23. *See infra* Part IV.A.

24. *See infra* Part IV.B.

25. *E.g.*, Bauerlien v. Warden, 236 Md. 346, 348, 203 A.2d 880, 881 (1964) (noting that a postconviction petitioner was unable to get a copy of the trial transcript because "in the

In any event, the larger number of meritless claims in collateral proceedings, including initial postconviction proceedings, can threaten to obscure the meritorious ones.

The goal, of course, is to find the balance among interests in finality, judicial economy, fairness (to both the petitioner and the state), and equal enforcement of the law. Although these interests are usually described as "competing," in the most basic sense they are consistent. *Both* the state (on behalf of the people it represents) and the convicted defendant have a deep *common* interest in remedying a wrongful conviction. Many years ago, the Court of Appeals of Maryland made this point in reaffirming that every judge in Maryland, acting as a "conservator of the peace," has the power to issue the writ of habeas corpus.[27] This is because "every case of unlawful imprisonment is a violation of the peace of the State, as well as of the right of the citizen."[28]

II. THE INCREASED IMPORTANCE OF STATE COLLATERAL REMEDIES

A. *The Development of a Strong Federal Role in the Protection of the Rights of Criminal Defendants Before and After Conviction*

During the 1930s, 1940s, and 1950s, the Supreme Court began to recognize new constitutional rights of state criminal defendants that applied against the states.[29] Although the Court eventually assumed a strong role in defining and protecting the rights of criminal defendants, its initial steps, taken as part of the "incorporation" debate, were tentative.[30] By the late 1950s and early 1960s, however, the federal

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seven years since the trial . . . the reporter's notes have been lost or destroyed and the dialogue of the trial cannot be recreated").

26. The Maryland Administrative Office of the Courts has asked a committee to examine the state's record-retention practices and policies. At a minimum, the central records in a convicted defendant's criminal case should be retained and stored during the period of that person's life. This would be a substantial change in the current practices, under which key records are destroyed after twelve years, and transcription notes after seven years.

27. *In re* Glenn, 54 Md. 572, 596 (1880) (holding unconstitutional a state law that limited judges' jurisdiction to issue writs of habeas corpus to the circuit in which the court sat, because Maryland's Constitution requires that jurisdiction be "co-extensive with the limits of the State").

28. *Id.*

29. *See, e.g.*, Rochin v. California, 342 U.S. 165, 172 (1952) (invalidating a criminal conviction based upon evidence obtained by pumping the defendant's stomach because that method is "too close to the rack and the screw to permit of constitutional differentiation"); Powell v. Alabama, 287 U.S. 45, 71 (1932) (recognizing a constitutional right to effective counsel in capital cases, applicable against the states).

30. *See* Palko v. Connecticut, 302 U.S. 319 (1937) (rejecting the argument that the Due Process Clause of the Fourteenth Amendment incorporated, and made applicable against

decisions[31] were motivating states, including Maryland, to make substantial changes in the remedies they provided to convicted defendants after direct appeal in order to keep pace with the Supreme Court.[32]

During the 1960s and 1970s, the Supreme Court expanded the federal role in protecting the pretrial, trial, and postconviction rights of defendants in criminal cases. The Court rendered a series of decisions, some on direct appeal[33] and others in federal habeas corpus cases,[34] which revolutionized criminal procedure.

As the Supreme Court expanded the rights of criminal defendants, it thereby increased the types of claims that state prisoners could raise by federal habeas corpus. There are differing views about when the Supreme Court and Congress determined that the scope of federal habeas corpus should encompass *all* federal constitutional

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the states, the Fifth Amendment's double jeopardy guarantee absent a "hardship so acute and shocking that our polity will not endure it"); Adamson v. California, 332 U.S. 46, 50-51 (1947) (rejecting the argument that the Due Process Clause of the Fourteenth Amendment incorporated, and made applicable against the states, the Fifth Amendment's privilege against self-incrimination). *But see* Malloy v. Hogan, 378 U.S. 1 (1964) (holding the Fifth Amendment to be applicable against the states); Griffin v. California, 380 U.S. 609 (1965) (holding that the Fifth Amendment, applicable to both the federal government and the states, prohibits commentary by the prosecution or the court on the defendant's silence); Benton v. Maryland, 395 U.S. 784, 796 (1969) (overturning *Palko*).

31. *See, e.g.*, Douglas v. California, 372 U.S. 353 (1963) (holding unconstitutional the denial of counsel on appeal to convicted indigent defendants); Griffin v. Illinois, 351 U.S. 12 (1956) (holding that an indigent appellant is constitutionally entitled to a free copy of the trial transcript); Brown v. Allen, 344 U.S. 443 (1953) (considering on habeas review not only procedural questions, but also the merits of constitutional claims).

32. *See infra* Part III.A.

33. *E.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (holding that the Sixth Amendment, as incorporated by the Fourteenth Amendment, required states to provide jury trials to criminal defendants when the federal government would be obligated to do so); Klopfer v. North Carolina, 386 U.S. 213 (1967) (holding that the defendant was denied the right to a speedy trial guaranteed by the Sixth Amendment, as incorporated by the Fourteenth Amendment); Miranda v. Arizona, 384 U.S. 436 (1966) (holding that the Fifth Amendment, as incorporated by the Fourteenth Amendment, prohibited the state from introducing statements made by defendants during custodial interrogation without specified warnings).

34. *E.g.*, Crist v. Bretz, 437 U.S. 28 (1978) (holding that the federal rule that jeopardy attached when a jury was sworn and empanelled was an integral part of the constitutional guarantee against double jeopardy and therefore applied against the states through the Fourteenth Amendment); Moore v. Illinois, 434 U.S. 220 (1977) (holding that the Sixth Amendment, as incorporated by the Fourteenth Amendment, prohibited introduction of evidence of identification obtained after the initiation of adversary judicial criminal proceedings and in the absence of counsel); Argersinger v. Hamlin, 407 U.S. 25 (1972) (holding that the Sixth Amendment, as incorporated by the Fourteenth Amendment, required appointment of counsel for indigent defendants in any prosecution for a crime punishable by imprisonment).

claims.[35] However, there seems to be a consensus that by 1953, after the Court decided *Brown v. Allen*,[36] this was the rule.[37]

B. The Federal Retrenchment

In the 1980s and 1990s, the Supreme Court and Congress reversed field by significantly restricting the extent to which state prisoners could use federal habeas corpus to challenge unconstitutional convictions and sentences.[38]

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35. *Compare* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 463-99 (1963) (tracing the development of federal habeas law and arguing that the principle that a final decision rendered by a competent state tribunal could be revisited in a federal habeas proceeding did not exist before the Court's 1953 decision in *Brown v. Allen*), *with* Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 610-63 (1982) (arguing that prisoners historically could use federal habeas corpus to assert due process rights). Hertz and Liebman urge a third view: historically, the scope of federal habeas has included "claims of particular national importance," including "recognized constitutional claims." 1 HERTZ & LIEBMAN, *supra* note 13, at 39-40.

36. 344 U.S. 443 (1953).

37. *See* 1 HERTZ & LIEBMAN, *supra* note 13, at 67-69; Bator, *supra* note 35, at 463; Peller, *supra* note 35, at 583. In 1976, the Supreme Court held that federal habeas petitioners could not assert claims based on the exclusionary rule for violations of the Fourth Amendment that was conceived in *Mapp v. Ohio*, 367 U.S. 643 (1961). Stone v. Powell, 428 U.S. 465 (1976). The Court noted that because it characterized that rule as "a judicially created remedy rather than a personal constitutional right," unlike rights clearly granted by the Fifth and Sixth Amendments, its decision was "not concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims." *Id.* at 495 n.37.

38. The Supreme Court, for example, ruled that, with limited exceptions, federal courts could not apply "new rules," defined expansively, in federal habeas corpus proceedings. Teague v. Lane, 489 U.S. 288 (1989) (overruling Linkletter v. Walker, 381 U.S. 618 (1965)). Further, the Court strictly defined and enforced procedural default rules. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 750 (1991) (holding that a lawyer's three-day late filing of an appeal from a state habeas decision waived his client's right to assert state habeas claims in a federal habeas proceeding since the client could not "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims [would] result in a fundamental miscarriage of justice"). The Court also held during this time period that federal habeas petitions containing multiple claims, some exhausted and some procedurally valid, must be dismissed. Rose v. Lundy, 455 U.S. 509 (1982). For a discussion of Supreme Court decisions curtailing the use of federal habeas in the 1980s, see Frank J. Remington, *State Prisoner Use of Federal Habeas Corpus Procedures: State Prisoner Access to Postconviction Relief—A Lessening Role for Federal Courts; An Increasingly Important Role for State Courts*, 44 OHIO ST. L.J. 287 (1983).

In recent years, however, the Supreme Court, acting on direct review, has recognized important constitutional rights of criminal defendants, especially in capital cases. *See, e.g.*, Ring v. Arizona, 536 U.S. 584 (2002) (holding that Arizona's capital punishment statute violated the defendant's Sixth Amendment right to a jury trial where a judge, without involvement of a jury, was authorized to make a factual determination about the existence of aggravating evidence for the purpose of imposing a stricter sentence); Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the execution of a mentally retarded defendant is an

In 1996, Congress consolidated and expanded these restrictions by enacting the Antiterrorism and Effective Death Penalty Act (AEDPA).[39] In summary form, these amendments to the federal habeas corpus statute: (1) impose a one-year statute of limitations for the filing of habeas corpus petitions in noncapital cases[40] and 180 days in capital cases;[41] (2) require federal courts to give substantial deference to factual findings of state courts, assuming certain conditions are satisfied;[42] (3) require federal judges to accept substantive decisions of state judges that are fairly adjudicated and explained even if those decisions are incorrect, as long as they are not "contrary to . . . clearly established [Supreme Court] law" and are not "an unreasonable application of [Supreme Court] law;"[43] (4) prohibit federal judges from applying any rules other than ones that, due to retroactive application, were in effect at the time of the highest state court decision in order to support the development of a factual claim not considered in the state court proceeding;[44] and (5) generally prohibit federal judges from deciding the merits of a claim when the petitioner, usually through counsel, violates a state procedural rule (for example, by failing to make a timely objection) and the petitioner cannot demonstrate "cause" for the default and "prejudice" therefrom.[45] Some of these rules codified rules from Supreme Court decisions, while others are more restrictive than prior Supreme Court decisions.

The result of these amendments is that federal habeas relief is generally available only to correct an egregious misapplication of a narrowly defined and clearly established Supreme Court ruling that was in effect at the time of the state court decision (no matter what the rules may be at the time of the habeas proceeding). Even then, it is only available if the petitioner's prior lawyers preserved the argument, the petitioner is confined in a federal circuit that will reasona-

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"excessive" punishment under the Cruel and Unusual Punishments Clause of the Eighth Amendment).

39. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

40. 28 U.S.C. § 2244(d)(1) (2000).

41. *Id.* § 2263(a).

42. *Id.* § 2254(e).

43. *Id.* § 2254(d).

44. *Id.* § 2254(e)(2).

45. *Id.* §§ 2244(b), 2254. There are narrow exceptions to this two-part requirement, including a showing of actual innocence. *See infra* Part IV.C.2.a. The result of the AEDPA and the earlier Supreme Court decisions is that "[f]ederal habeas litigation is now overwhelmingly concerned with the procedural posture of an inmate's constitutional claims rather than with the merits of those claims." Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. CHI. LEGAL F. 315, 317.

bly apply the habeas rules, and the petition is filed within the deadline. For many prisoners, this last requirement, by itself, may be prohibitive due to the delays in state postconviction litigation. Because of the sheer volume of state noncapital postconviction cases, the time it takes to investigate and prepare the state petition, and the resulting delay in providing counsel to state inmates, there is a real risk that the one-year statute of limitations for filing the federal habeas petition will run in a number of cases before the inmate's lawyer can file the state petition.

The result of these factors is that the federal habeas corpus check on state court interpretations of the United States Constitution has been effectively eliminated in most cases.

C. *The Reduced Use of the State Clemency Power*

The state judicial responsibility is enhanced by another factor, the substantially reduced use of executive clemency as a last-resort remedy for wrongful convictions and unnecessary incarceration.[46] Clemency is a plenary, discretionary executive power.[47] Some states vest this power solely in the governor.[48] Some vest the power in an independent board.[49] Others provide for a shared clemency power, between the governor and others.[50] Many states, including Maryland,

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46. I use the term "clemency" generically to include unconditional pardons, conditional pardons, commutations of sentences, stays of execution and reprieves, and any other type of executive relief from criminal convictions or sentences. The use of clemency has been the subject of much scholarship. *See generally* Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255 (1990-91); Alyson Dinsmore, *Clemency in Capital Cases: The Need to Ensure Meaningful Review*, 49 UCLA L. REV. 1825 (2002); Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 413 (1999); Adam M. Gershowitz, *The Diffusion of Responsibility in Capital Clemency*, 17 J.L. & POL. 669 (2001); Daniel T. Kobil, *How to Grant Clemency in Unforgiving Times*, 31 CAP. U. L. REV. 219 (2003); Victoria J. Palacios, *Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 VAND. L. REV. 311 (1996); Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-*Furman *Cases*, 27 U. RICH. L. REV. 289 (1993).

47. *See, e.g.*, Bedau, *supra* note 46, at 257 (describing clemency decisions as "standardless in procedure, discretionary in exercise, and unreviewable in result").

48. *See* IDAHO CONST. art. IV, § 7; COLO. REV. STAT. ANN. §§ 16-17-101 to -102 (West 2004); N.Y. EXEC. LAW § 15 (McKinney 2004); N.C. GEN. STAT. § 147-21 (2004); R.I. GEN. LAWS §§ 13-10-1 to -2 (2002); VT. STAT. ANN. tit. 28, § 809 (2000); W.VA. CODE ANN. § 5-1-16 (Michie 2002); WYO. STAT. ANN. § 7-13-801 (2003).

49. *See* CONN. GEN. STAT. ANN. § 54-130a (West 2005) (formerly § 18-26); GA. CODE ANN. § 42-9-42 (2005); S.C. CODE ANN. § 24-21-1000 (Supp. 2004); UTAH CODE ANN. § 77-27-5 (2003).

50. *See* ARIZ. REV. STAT. ANN. § 31-402 (West Supp. 2004); FLA. STAT. ANN. § 940.01 (West Supp. 2005); 71 PA. CONS. STAT. ANN. § 299 (West Supp. 2004); TEX. CODE CRIM.

vest the power in the governor, but authorize a board or agency to conduct investigations and make recommendations to the governor.[51] Other states have hybrids of these approaches.[52]

Although there is data showing a substantial decrease in the use of the federal clemency power by the President,[53] state data is not

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PROC. ANN. art. 48.01 (Vernon Supp. 2004-05); WASH. REV. CODE ANN. § 9.94A.885 ann. (West 2003).

51. *See* DEL. CODE ANN. tit. 11, §§ 4361-4364 (2005); HAWAII REV. STAT. ANN. § 353-72 (Michie 2004); 730 ILL. COMP. STAT. ANN. 5/3-3-13 (West 1997); IND. CODE ANN. § 11-9-2-2 (Michie 2003); IOWA CODE ANN. §§ 914.1-.7 (West 2003); KAN. STAT. ANN. § 22-3701 (Supp. 2004); KY. CONST. § 77; KY. REV. STAT. ANN. § 439.450 (Banks-Baldwin 2004); ME. REV. STAT. ANN. tit. 15, §§ 2161-2164 (West 2003); MD. CODE ANN., CRIM. PROC. §§ 7-206(3), 7-601 (2004); MASS. GEN. LAWS. ANN. ch. 127, §§ 152, 154 (West 2002); MICH. CONST. art. V, § 14; MICH. COMP. LAWS ANN. §§ 791.243-.244 (West 2004); MISS. CONST. art. V, § 124; MISS. CODE ANN. § 47-7-31 (2004); MO. ANN. STAT. § 217.800 (2004); N.H. REV. STAT. ANN. §§ 4:21–:25 (2001); N.J. STAT. ANN. § 2A:167-4 (2005); N.M. CONST. art. V, § 6; N.M. STAT. ANN. § 31-21-17 (Michie 2000); N.D. CENT. CODE §§ 12-55.1-02, -04 (2003); OHIO REV. CODE ANN. § 2967.02 (2005); OKLA. STAT. ANN. tit. 57, §§ 332, 332.2 (West 2004); S.D. CODIFIED LAWS § 24-14-1 (Michie 1998); TENN. CODE ANN. §§ 40-27-101, -28-126 (2003); VA. CODE ANN. §§ 53.1-229 to -231 (2002); WIS. STAT. ANN. § 304.08 (West 2005); *see also* Act to Amend Provisions Concerning Clemency Procedures, 2005 ARK. ACTS 1975, sec. 3, § 16-93-204.

52. *See* ALA. CODE § 15-22-36(a) (2004) (the primary authority to grant pardons rests with the Board of Pardons and Parole, with the exception that only the governor has the authority to commute death sentences); CAL. PENAL CODE §§ 4800-4801 (West 2000 & Supp. 2005) (the Board of Prison Terms may "report" cases to the governor for consideration); CAL. CONST. art. V, § 8 (the governor has clemency power, although in cases in which a prisoner has been convicted of two or more felonies in separate proceedings, a majority vote by the California Supreme Court is required to grant clemency); LA. REV. STAT. ANN. § 15:572 (West 2005) (the governor has power to grant a reprieve, but approval of the Board of Pardons is needed for a full pardon, and a first-time offender is automatically pardoned after completion of his sentence); MINN. STAT. ANN. § 638.01 (West 2003) (the governor is one of three members of a Board of Pardons that has clemency power); MONT. CODE ANN. § 46-23-301 (2004) (the governor makes the final clemency decision, however, in noncapital cases, there must first be a positive "recommendation" from the Parole Board); NEB. CONST. art. IV, § 13 (the governor is one of three members of the Board of Pardons, which has clemency power); NEV. REV. STAT. ANN. 213.010 (Michie 2004) (the governor is one member of the Board of Pardons, which also includes justices of the state supreme court and the attorney general); OR. REV. STAT. §§ 137.225, 144.649 (2003) (the governor has clemency power, although in a limited number of cases, a court may "set aside" a conviction after a sentence is served).

53. On the federal level, the power to grant clemency is vested in the President. Article II, § 2 of the United States Constitution states: "The President . . . shall have Power to grant Reprieves and Pardons . . . ." During the past three decades, executive clemency has been granted with decreasing frequency. Between the administrations of Calvin Coolidge (1923-1929), and Lyndon B. Johnson (whose administration ended in 1969), every President issued at least 1,150 grants of executive clemency in some form, with the exception of John F. Kennedy, who issued 575 such grants in his abbreviated administration. P.S. Ruckman, Jr., Federal Executive Clemency in the United States, 1789-1995: A Preliminary Report (1995), *available at* http://ednet.rvc.cc.il.us/~PeterR/Papers/paper3.htm. Beginning with Richard Nixon, however, the exercise of the federal clemency power has decreased substantially. President Nixon issued 926 grants of clemency, and no President since then

readily available.[54] Nonetheless, it appears that governors and other clemency decisionmakers generally have become less willing to use the clemency power. Professor Victoria J. Palacios contends that "the commutation power is virtually dead because of the belief that 'super due process' has virtually eliminated error and because the political consequences of granting commutations are too great."[55] With regard to clemency in capital cases, she concludes that "[i]n the last quarter century, there has been a dramatic decline in death penalty commutations—so much so that some say the clemency power is now defunct."[56] Adam M. Gershowitz agrees, stating that "[t]he decline in executive clemency has been well documented (and lamented)."[57] Although Gershowitz's claim that the decline has been well-documented may not be accurate, his underlying conclusion seems to be generally accepted.

This decline in clemency comes at the same time that a number of federal judges, including Chief Justice Rehnquist, point to the existence of executive clemency as a reason to limit the scope of federal habeas corpus, and as a justification for unforgiving rules of procedural default.[58]

The reinstitution, in Maryland, of the traditional policy of considering for parole or commutation prisoners sentenced to life with parole is laudable.[59] However, the use of that power still is quite limited.[60]

D. The Enhanced Role of State Judges and the Increased Importance of State Collateral Remedies

Several state appellate courts have recognized that the above limitations, especially those on federal habeas corpus, justify a more

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issued more than 600. *See* Ruckman, *supra*. Even with the glut of last-minute pardons handed down by President Clinton, his total number of clemency grants was only 456. Jonathan Peterson & Lisa Getter, *Clinton Pardons Raise Questions of Timing, Motive*, L.A. TIMES, Jan. 28, 2001. These data justify the conclusion that "[t]he presidential clemency power has atrophied in the last half century." Palacios, *supra* note 46, at 348.

54. *See* Bedau, *supra* note 46, at 262 (noting that "[r]eadily accessible published information leaves much to be desired"); Radelet & Zsembik, *supra* note 46, at 291 (noting that "there is no single source which provides statistics regarding the frequency of clemency and the names of prisoners who are awarded clemency in capital cases").

55. Palacios, *supra* note 46, at 313 (citations omitted).

56. *Id.* at 348.

57. Gershowitz, *supra* note 46, at 671 (citing Palacios, *supra* note 46).

58. *See* Palacios, *supra* note 46, at 335.

59. *See supra* note 18.

60. *See supra* note 18.

searching level of review in state collateral cases. *State v. Preciose*[61] is a representative example.

In *Preciose,* the defendant filed a postconviction petition challenging the effectiveness of his lawyer, who represented him at trial and on appeal. The postconviction court denied relief, and the intermediate appellate court affirmed, holding that Preciose had waived his ineffectiveness argument by failing to make it earlier.[62] In an unreported opinion, the intermediate appellate court said it was expressly grounding its decision on this state procedural default to preclude federal habeas review of the merits of the argument.[63]

The New Jersey Supreme Court reversed, holding that Preciose had not waived his claims, and that he had established, prima facie, that his lawyer was ineffective.[64] The opinion admonished the state's judiciary about the importance, *particularly given the federal "retrenchment,"* of deciding issues on the merits rather than relying upon procedural defaults:

> It would be a bitter irony indeed if our courts, in an attempt to accommodate the Supreme Court's retrenchment of federal habeas review, were artificially to elevate procedural rulings over substantive adjudications in post-conviction review, at a time when the Court's curtailment of habeas review forces state prisoners to rely increasingly on state post-conviction proceedings as their last resort for vindicating their state and federal constitutional rights. . . . [W]hen meritorious issues are raised that require analysis and explanation, our traditions of comprehensive justice will best be served by decisions that reflect thoughtful and thorough consideration and disposition of substantive contentions.[65]

The court emphasized that state courts, unlike their federal counterparts, cannot justify procedural default rules with federalism-based arguments:

> The Supreme Court's deference to state procedural bars is based largely on comity and federalism—concerns that simply do not apply when this Court reviews procedural rulings by our lower courts. Indeed, considerations of federalism dictate that our state courts should enforce New Jersey's

61. 609 A.2d 1280 (N.J. 1992).

62. *Id.* at 1284.

63. *Id.* at 1287.

64. *Id.*

65. *Id.* at 1294.

> post-conviction rules without attempting to emulate the federal habeas decisions.[66]

The court added that the federal deference to state rules of procedural default "presumes well-reasoned state procedural defaults that may in fact be the result of hostility towards federal rights or federal right-holders or of outmoded state procedures."[67] To avoid this, the court suggested, state courts ought to make sure that, under their rules, arguments in collateral cases are resolved on the merits whenever reasonably possible. If state courts do not do so, they will support "a theory of federalism that subordinates the vindication of federal constitutional rights to a state's enforcement of its procedural rules."[68] The court acknowledged that court decisions on the merits will produce more federal habeas decisions on the merits, but that is not inconsistent with the *legitimate* state interest in finality:

> From our state perspective, finality is achieved when our courts grant or deny post-conviction relief. Any state court judgment later overturned by federal habeas review presumably will have been undeserving of finality. We are not so convinced of our infallibility, or so jealous of our sovereignty, as to deem federal habeas review an undesirable intrusion on our adjudications . . . . Where meritorious issues are presented, our interest in affording defendants access to both state post-conviction and federal habeas review outweighs our interest in finality through an unnecessarily-rigid enforcement of state procedural rules. Simply put, considerations of finality and procedural enforcement count for little when a defendant's life or liberty hangs in the balance.[69]

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66. *Id.* at 1292. The opinion cited *D'Amico v. Manson*, 476 A.2d 543, 545-56 (Conn. 1984), in which the state court had applied a "less-restrictive standard to state post-conviction petitions 'despite the later development of [the] more restrictive' [federal] standard for federal habeas review." *Preciose*, 609 A.2d at 1292-93.

67. *Preciose*, 609 A.2d at 1291. The court did not ignore the legitimate interests underlying procedural default rules. Such rules "achieve[ ] the important state goals of finality and judicial economy," avoid "disconnected and piecemeal" litigation, and "prevent[ ] the abuse of post-conviction proceedings." *Id.* at 1292 (citations omitted).

68. *Id.* at 1291.

69. *Id.* at 1293. The court added: "Our compelling judicial interest in sustaining only those convictions free from constitutional error is disserved by decisions of our courts or, for that matter, federal courts that limit the availability of federal habeas review in cases in which such review may be warranted." *Id.* at 1281.

III. MARYLAND COLLATERAL REMEDIES

A. Writ of Habeas Corpus

Although the PCPA has displaced habeas corpus as the primary vehicle for challenging the legality of one's conviction, state habeas still is an important remedy in Maryland. Like PCPA remedies, "habeas corpus remedies are available only if the defendant is in custody or subject to conditions of parole or probation."[70]

For example, it is a means by which a prisoner can challenge an error by the Division of Correction (DOC) in calculating the prisoner's sentence,[71] the DOC's failure to credit earned "good conduct time" against a sentence,[72] the use of an invalid prior conviction as the predicate for an enhanced sentence under a recidivism law,[73] the retroactive application of a law requiring gubernatorial approval of parole,[74] and the unlawful revocation of a prisoner's release under "mandatory supervision."[75]

Relief in habeas cases can include release of the petitioner or measures short of release. A court "need not choose simply between

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70. Fairbanks v. State, 331 Md. 482, 492 n.3, 629 A.2d 63, 68 n.3 (1993); *see* MD. CODE ANN., CTS. & JUD. PROC. § 3-702 (2004). In *Fairbanks*, the court equated the "custody" requirements for state habeas corpus and postconviction proceedings. 331 Md. at 492 n.3, 629 A.2d at 68 n.3. It cited *McMannis v. State*, 311 Md. 534, 536 A.2d 652 (1988), in which the court cited with approval federal decisions that extended the federal habeas corpus "custody" requirement to include the conditions of both post-incarceration parole and pretrial release on one's own recognizance.

71. *E.g.*, Md. Corr. Inst. v. Lee, 362 Md. 502, 766 A.2d 80 (2001) (holding that the alleged failure by the Division of Correction to clarify a commitment record, in conflict with the sentence announced orally by the sentencing court, is cognizable by habeas corpus); *accord* Mateen v. Galley, 146 Md. App. 623, 807 A.2d 708 (2002).

72. *E.g.*, Md. House of Corr. v. Fields, 348 Md. 245, 261, 703 A.2d 167, 175 (1997). "[A]n inmate is not required to utilize the [administrative] inmate grievance procedure, and courts will entertain an inmate's petition for habeas corpus when the plaintiff alleges entitlement to immediate release and makes a colorable claim that he or she has served the entire sentence less any mandatory credits." *Id.* This holding was pursuant to MD. CONST. art. III, § 55, which "provides that 'the General Assembly shall pass no Law suspending the privilege of the Writ of Habeas Corpus.'" *Fields*, 348 Md. at 260, 703 A.2d at 175. Prisoners who seek uncredited good time, which if credited would not entitle them to release, must assert their claim through the administrative Inmate Grievance Office. If such a challenge is unsuccessful, they can pursue appeals in circuit court, and from those decisions, to the Court of Special Appeals. *See, e.g.*, Sec'y, Dep't of Pub. Safety & Corr. Servs. v. Hutchinson, 359 Md. 320, 324, 753 A.2d 1024, 1026 (2000).

73. *Fairbanks*, 331 Md. at 488, 629 A.2d at 66.

74. Gluckstern v. Sutton, 319 Md. 634, 574 A.2d 898 (1990) (holding that such retroactive application violated the Ex Post Facto Clause).

75. Sec'y, Dep't of Pub. Safety & Corr. Servs. v. Henderson, 351 Md. 438, 718 A.2d 1150 (1998). For pretrial inmates, habeas corpus also is the statutory mechanism to challenge bail decisions. CTS. & JUD. PROC. § 3-707.

discharge of the defendant and the denial of all relief, but may tailor relief as justice may require."[76]

The general statutory provisions authorizing appeals from final judgments do not apply to habeas corpus. Rather: "An appeal may be taken from a final order in a habeas corpus case only where specifically authorized by statute."[77] There are four statutes pertaining to appeals or applications seeking leave to appeal in habeas corpus cases.[78] The one provision directly relevant to this article is section 7-107 of the PCPA.[79] This provision abolishes appeals in habeas cases when a habeas petitioner challenges "the validity of confinement under a sentence of death or imprisonment."[80] Rephrased, section 7-107 has no effect on an appeal when the petitioner does not "challenge the legality of a conviction of a crime or sentence of death or imprisonment for the conviction of the crime."[81] The test is whether the habeas petition seeks relief for which the PCPA provides a remedy.[82] If it does, the decision denying or granting it is not appealable.[83]

A prisoner still may use habeas corpus to challenge his conviction and sentence, but, in order to understand this, and the development of the primary postconviction remedy under the PCPA, a little history is useful.

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76. *Lee*, 362 Md. at 518, 766 A.2d at 89 (internal quotation marks omitted).

77. *Gluckstern*, 319 Md. at 652, 574 A.2d at 906.

78. *Id.*

79. MD. CODE ANN., CRIM. PROC. § 7-107 (2004) (formerly codified, with some different language, at art. 27, § 645A(e)). The others govern appeals from a bail decision, an extradition decision, and a decision holding unconstitutional the law under which the petitioner was convicted. *Gluckstern*, 319 Md. at 652-53, 574 A.2d at 906; *see* MD. CODE ANN., CRIM. PROC. § 9-110 (2001) (formerly codified, with some different language, at art. 41, § 2-210); CTS. & JUD. PROC. §§ 3-706 to -707.

80. CRIM. PROC. § 7-107(b).

81. *Id.* § 7-107(b)(2)(ii). The important, but sometimes elusive, distinction is between a habeas challenge to the sentence, which is not appealable, and one to the detention, which is. *See, e.g.*, *Lee*, 362 Md. at 517, 766 A.2d at 88; Mateen v. Galley, 146 Md. App. 623, 807 A.2d 708 (2002).

82. *See infra* Part III.C.

83. In *Ruby v. State*, 353 Md. 100, 724 A.2d 673 (1999), the court said that "[i]n 1965, the Legislature added new language to the [PCPA] in subsection (e), which this Court has interpreted as allowing appeals from habeas corpus cases 'in situations where the Post Conviction Procedure Act did not provide a remedy, and thus was not a substitute for habeas corpus.'" *Id.* at 106 n.4, 724 A.2d at 676 n.4 (quoting *Gluckstern*, 319 Md. at 662, 574 A.2d at 912). In 1970, the General Assembly clarified that unsuccessful habeas corpus petitioners could appeal to the Court of Special Appeals in those cases in which they were not using habeas corpus to challenge their convictions or sentences. Act of May 5, 1970, ch. 595, 1970 Md. Laws 1711, 1711-12 (codified as amended at CRIM. PROC. § 7-107).

Prior to 1958, when the Maryland General Assembly enacted the PCPA,[84] the primary mechanism to challenge the legality of one's detention was a writ of habeas corpus.[85] Maryland's version of the writ can be traced to early fourteenth century English common law.[86] Parliament eventually reduced this common-law remedy to statute by enacting "'the famous habeas corpus act, 31 Car. II. c. 2,' [which] was 'frequently considered as another *magna carta* of the kingdom.'"[87] In

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84. Act of April 4, 1958, ch. 44, 1958 Md. Laws 178 (codified as amended at MD. CODE ANN., CRIM. PROC. §§ 7-101 to -301 (2004); previously codified at MD. CODE ANN. art. 27, § 645A(a)).

85. *See generally* Tomlinson, *supra* note 5. There were other common-law remedies as well, including the writ of error *coram nobis*, which remains a viable postconviction remedy today, especially for those who are no longer confined or in the custody of the state. *See* Skok v. State, 361 Md. 52, 760 A.2d 647 (2000); *Ruby*, 353 Md. 100, 724 A.2d 673. "A writ of error *coram nobis* is a common law tool primarily used to correct factual errors by a court." *Ruby*, 353 Md. at 104, 724 A.2d at 675. Through it, a petitioner today can still "bring before the court facts which were not brought into issue at the trial of the case, and which were material to the validity and regularity of the proceedings, and which, if known by the court, would have prevented the judgment." Madison v. State, 205 Md. 425, 432, 109 A.2d 96, 99 (1954). In *Skok v. State*, the Court of Appeals breathed new life into the writ of error *coram nobis*, and in the process "overrul[ed] a multitude of cases, extending back to 1838, which had given an extremely narrow scope to the writ." Harris v. Bd. of Educ., 375 Md. 21, 50, 825 A.2d 365, 382 (2003). At the threshold, the court held that Skok could appeal the decision of the circuit court denying him relief despite Article 27, section 645A(e) of the PCPA, which abolished appeals in *coram nobis* cases (as well as habeas corpus and others) "which have heretofore been available for challenging the validity of incarceration under sentence of death or imprisonment." *Skok*, 361 Md. at 63, 760 A.2d at 653. The court held that this language did "not apply to one [like Skok] who has fully served his or her sentence and is using coram nobis to challenge a conviction because of serious collateral consequences." *Id.* at 63-64, 760 A.2d at 653. The court then expanded the traditional scope of *coram nobis* by holding that a petitioner "who is suddenly faced with a significant collateral consequence of his or her conviction, and who can legitimately challenge the conviction on constitutional or fundamental grounds," can use *coram nobis* to challenge the conviction based on "an error of law." *Id.* at 78, 760 A.2d at 661. The court limited its new rule in several respects. First, "the grounds for challenging the criminal conviction must be of a constitutional, jurisdictional or fundamental character." *Id.* Second, "a presumption of regularity attaches to the criminal case, and the burden of proof is on the coram nobis petitioner." *Id.* Third, "the coram nobis petitioner must be suffering or facing significant collateral consequences from the conviction." *Id.* at 79, 760 A.2d at 661. Fourth, "[b]asic principles of waiver are applicable to issues raised in coram nobis proceedings." *Id.* And fifth, "one is not entitled to challenge a criminal conviction by a coram nobis proceeding if another statutory or common law remedy is then available." *Id.* at 80, 760 A.2d at 662; *see* Parker v. State, 160 Md. App. 672, 866 A.2d 885 (2005) (applying *Skok*).

86. In *Olewiler v. Brady*, 185 Md. 341, 345, 44 A.2d 807, 809 (1945), the court quoted from an English decision, *Secretary of State for Home Affairs v. O'Brien*, [1923] 603 A.C. 609 (H.L. 1923) (appeal taken from Ir.), to describe the origins of habeas corpus: "It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I."

87. *Olewiler*, 185 Md. at 345-46, 44 A.2d at 809 (quoting 3 BLACKSTONE'S COMMENTARIES 135).

1809, the Maryland General Assembly "substantially re-enacted" the English statute, "with some changes."[88] In 1867, habeas was incorporated into the Maryland Constitution.[89]

It was difficult, however, to adapt the historic writ to the needs of the mid-twentieth-century criminal justice system. In some ways, the writ provided too little; in others, too much.

Historically, the scope of the writ was exceedingly narrow. In 1880, in *In re Glenn*,[90] the Court of Appeals said that "the sole inquiry [in a habeas case] is, generally, whether the [trial court] had jurisdiction of the offence recited and of the person of the party accused, and whether the judgment or sentence recited in the commitment be such as the [court] was authorized by law to render or impose."[91] Habeas could be used only to challenge a conviction or sentence that was not merely erroneous, but an absolute nullity.

In the 1930s, 1940s and 1950s, the Supreme Court took the first steps in what would come to be called the "criminal law revolution."[92] As the Court recognized new rights, state prisoners obtained more claims that they might assert in state collateral proceedings. The Supreme Court made it clear that prisoners could assert these rights on federal habeas corpus[93] and that it would not defer to unreasonable state procedural default rules.[94]

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88. *Id.* at 346, 44 A.2d at 809.

89. *See* MD. CONST. art. III, § 55 ("The General Assembly shall pass no Law suspending the privilege of the Writ of *Habeas Corpus*.").

90. 54 Md. 572 (1880).

91. *Id.* at 607. In *Glenn*, the court that issued the writ of habeas corpus was not in the circuit in which the conviction had been entered. *Id.* at 610. The Court of Appeals suggested a broader role for habeas, in conjunction with a writ of certiorari, if the court had been in the jurisdiction in which the conviction had been imposed. *Id.* Then, it might have issued both a writ of habeas corpus (bringing the prisoner, more precisely his "body," before the court), and a writ of certiorari (bringing the record of conviction before the court). *Id.* The prisoner then could "go behind the conviction recited in the warrant of commitment to question the regularity of the proceedings upon which the conviction is founded, or to impeach the conviction itself for errors therein, other than the want of jurisdiction in the premises." *Id.* at 609. The Court of Appeals held, however, that in this case, where an out-of-circuit court heard a habeas case and it was "heard and determined upon the return to the writ alone," the conviction was presumed to be lawful. *Id.* at 607.

92. *See* Laurence A. Benner et al., *Criminal Justice in the Supreme Court: A Review of United States Supreme Court Criminal and Habeas Corpus Decisions (October 4, 1999-October 1, 2000)*, 37 CAL. W. L. REV. 239, 288 (2001); *Tribute to the Honorable Robert C. Underwood*, 1984 U. ILL. L. REV. 857, 861; Bruce J. Winick, *Presumptions and Burdens of Proof in Determining Competency to Stand Trial: An Analysis of* Medina v. California *and the Supreme Court's New Due Process Methodology in Criminal Cases*, 47 U. MIAMI L. REV. 817, 820 (1993); *see also supra* Part II.A.

93. Brown v. Allen, 344 U.S. 443 (1953).

94. Fay v. Noia, 372 U.S. 391 (1963).

By comparison, in Maryland (as well as most other states), the collateral remedies were more limited. This produced considerable federal-state tension, which manifested itself most openly when federal courts had to decide whether to require state prisoners to exhaust state remedies, and how much deference they ought to give to the factual findings and legal conclusions of state courts. These tensions surfaced in several Supreme Court decisions in which the Court first urged state courts to expand the scope of state habeas,[95] then openly criticized the failure of states to do so,[96] and finally suggested that states might be obligated by the United States Constitution to adopt adequate postconviction measures.[97]

The Court of Appeals of Maryland answered this challenge in 1945 in *Olewiler v. Brady*.[98] The court reiterated the basic rule that state habeas corpus was available only to challenge a conviction that was a "nullity."[99] But it went on to adopt something of a jurisdictional fiction that the United States Supreme Court had devised in *Johnson v. Zerbst*:[100] that constitutional errors, at least serious ones, could deprive a court of its jurisdiction "in the course of the proceedings,"[101] i.e., midway through a trial, and thereby render a conviction a nullity.[102]

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95. *See* Mooney v. Holohan, 294 U.S. 103, 113 (1935) (noting the state courts' power to use habeas corpus to remedy a deprivation of the petitioner's "liberty without due process of law in violation of the Constitution of the United States," and observing that "[u]pon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution").

96. *See generally* Young v. Ragen, 337 U.S. 235, 236 (1949).

97. *See* Case v. Nebraska, 381 U.S. 336, 337 (1965) (per curiam) (noting that certiorari had been granted to consider whether a state's failure to provide an effective postconviction remedy may violate the Due Process Clause of the Fourteenth Amendment).

98. 185 Md. 341, 44 A.2d 807 (1945).

99. *Id.* at 344, 44 A.2d at 808.

100. 304 U.S. 458 (1938).

101. *Id.* at 468.

102. In *Zerbst*, the Supreme Court reversed a federal habeas decision in which the district court had denied relief, despite the fact that the petitioner had not knowingly and voluntarily waived his Sixth Amendment right to counsel. *Id.* at 467. The Supreme Court said that "[s]ince the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential *jurisdictional* prerequisite to a federal court's authority to deprive an accused of his life or liberty." *Id.* (emphasis added). Therefore, "[i]f the accused . . . is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a *jurisdictional* bar to a valid conviction and sentence depriving him of his life or his liberty." *Id.* at 468 (emphasis added). That is, the Court explained: "A court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure to . . . provid[e] counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake." *Id.* A conviction under these circumstances is void. *Id.* The opinion stressed that the "principles" limiting habeas corpus "must be construed and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty." *Id.* at 465.

The Maryland Court of Appeals said that "[r]ecent Supreme Court cases hold that through violation of certain constitutional rights in criminal procedure a trial court may lose its jurisdiction 'in the course of the proceedings,' and its judgment may therefore be void."[103] The Court of Appeals said, however, that this addition to the nullity-only basis for habeas relief did not encompass "mere error," for example, "as to the number of peremptory challenges of jurors," or the errors that Olewiler had alleged.[104]

If the restrictive scope of state habeas provided too little to prisoners, there were other aspects of habeas that provided too much. Judicial decisions in habeas cases, whether granting or denying the application for a writ, had no res judicata effect. Therefore, prisoners could file as many petitions as they wished.[105] Neither party could appeal a habeas decision, and thus there was no way to provide finality.[106]

In 1945, the General Assembly responded, in part, to these problems. It granted both the petitioner and the State the right to appeal from a habeas corpus decision.[107] Although the General Assembly did not limit the petitioner's right to file successive petitions before different judges, it did provide that, in a case in which a petitioner had been granted a hearing on a prior petition, a subsequent judge could refuse to issue the writ, i.e., decide not to bring the petitioner before the court for a hearing. The subsequent judge was to make this decision based on whether the successive petition presented

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103. *Olewiler*, 185 Md. at 344, 44 A.2d at 808 (citing *Zerbst*, 304 U.S. at 468).

104. *Id.* at 345, 44 A.2d at 808. The errors included that Olewiler and his rifle, which he used to kill the victim, had been unreasonably seized. *Id.* at 343-44, 44 A.2d at 808. The Court of Appeals pointed out that there was no dispute about Olewiler's identity or that he had shot the victim. *Id.* at 345, 44 A.2d at 809.

105. *E.g.*, *Ex parte* Berman, 14 F. Supp. 716, 717 (D. Md. 1936); *see also* Charles Markell, *Review of Criminal Cases in Maryland by Habeas Corpus and by Appeal*, 101 U. PA. L. REV. 1154, 1162 (1953).

106. *See Berman*, 14 F. Supp. at 717 ("Maryland practice provides for issuance of the writ of habeas corpus by any of the State Judges but does not provide an appeal from their decisions. The refusal of the writ in one case is therefore not regarded as res adjudicata.").

107. Markell, *supra* note 105, at 1157 (discussing Act of April 23, 1945, ch. 702, § 3C, 1945 Md. Laws 768, 769). In 1947, the General Assembly amended the statute "to substitute for a right of appeal a right 'to apply to the Court of Appeals . . . for leave to prosecute an appeal therefrom.'" *Id.* (quoting Act of April 26, 1947, ch. 625, § 3C, 1947 Md. Laws 1562, 1563-64). Over the next few years, this substantially increased the workload of the Court of Appeals. John D. Alexander, Jr., Note, *The Maryland Version of the Uniform Post Conviction Procedure Act, with Special Reference to the Writ of Habeas Corpus*, 19 MD. L. REV. 233, 235-36 (1959). In a 1958 report, the Maryland Administrative Office of the Courts described the increases in the numbers of applications for leave to appeal habeas decisions. There were a total of 203 in the six years prior to 1956, 82 in 1956, and 128 in 1957. *Id.* at 236 n.19.

"new grounds of a substantial nature" or whether the prior grounds had been "fully and adequately presented."[108]

The enactment of the PCPA in 1958 slowed the common-law evolution of habeas corpus in Maryland by abolishing appeals when habeas is used to challenge convictions and sentences, and accelerated its statutory development. Section 7-107(b)(2)(ii) of the PCPA indicates, by negative implication (by barring appeals), that habeas may be used to challenge the "legality of a conviction" or of a "sentence."[109] Maryland Rule 15-304 gives the petitioner a PCPA-or-habeas choice. When a petitioner files a habeas petition, "the judge may order that the petition be treated as a petition under the Post Conviction Procedure Act if the individual confined consents in writing or on the record and the judge is satisfied that the post conviction proceeding is adequate to test the legality of the confinement."[110] This alternative approach, in the discretion of the petitioner, is consistent with the history of the PCPA.[111] In response to history and text, appellate courts seem to accept that habeas now has the same scope as the PCPA.[112]

The choice offered to petitioners is weighted in favor of the PCPA, however, to advance the goal of making the PCPA the uniform collateral remedy. The PCPA provides counsel to indigent petitioners,[113] gives them a right to a hearing,[114] and provides that an unsuc-

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108. Markell, *supra* note 105, at 1161. In a 1948 decision, the court "[a]ssum[ed], without deciding, that notwithstanding the Act of 1945, the doctrine of *res judicata* does not extend to a decision on habeas corpus . . . , nevertheless such a [prior] decision is not without weight on a later application." State *ex rel.* Eyer v. Warden, 190 Md. 767, 772, 59 A.2d 745, 747 (1948) (citation omitted). Markell thought that, by 1953, the abuses of the writ had been substantially redressed

> by abolishing the general (though not universal) practice of issuing the writ as a matter of course, without any showing of need for it, and by giving a general right of appeal, thus substituting authoritative statements of the law for the action of 37 judges, of equal authority [apparently the number of trial judges in Maryland], not subject to review by any higher court.

Markell, *supra* note 105, at 1163.

109. MD. CODE ANN., CRIM. PROC. § 7-107(b)(2)(ii) (2004).

110. MD. R. 15-304.

111. *See infra* Part III.C.1.b.

112. In *Maryland Correctional Institution v. Lee*, 362 Md. 502, 766 A. 2d 80 (2001), the court said that "habeas corpus is an appropriate method to challenge the lawfulness of an underlying conviction and detention." *Id.* at 517, 766 A.2d at 89. It quoted from the Courts and Judicial Proceedings Article of the Maryland Code, which states:

> (a) Petition. A person committed, detained, confined, or restrained from his lawful liberty within the State for any alleged offense or under any other color or pretense or any person in his behalf, may petition for writ of habeas corpus to the end that the cause of the commitment, detainer, confinement, or restraint may be inquired into.

MD. CODE ANN., CTS. & JUD. PROC. § 3-702(a) (2002).

cessful petitioner can seek leave to appeal an adverse decision.[115] The habeas provisions do not provide these rights.[116]

On the other hand, a habeas petitioner can file the petition with any judge in the state,[117] and the provisions that govern successive petitions and the assertion of new grounds for relief are more flexible than those in the PCPA.[118]

B. Motion to Correct Illegal Sentence

Maryland Rule 4-345(a) provides that a "court may correct an illegal sentence at any time."[119] The motion is "part of the same criminal proceeding" in which the sentence was imposed and is "not a wholly independent action."[120] It "simply grants the trial court limited continuing authority in the criminal case to revise the sentence."[121]

In noncapital cases, Maryland's appellate courts have allowed litigants to bring a variety of claims about improper sentences, including claims that: (1) no sentence could have lawfully been imposed, for example, because the double jeopardy guarantee prohibited trial, and therefore barred any sentence, on a charge;[122] (2) a sentence ex-

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113. MD. CODE ANN., CRIM. PROC. § 7-108 ann. (2004).

114. *Id.* § 7-108(a).

115. *Id.* § 7-109(a).

116. *See* CTS. & JUD. PROC. §§ 3-701 to -707; MD. R. 15-301 to -312.

117. CTS. & JUD. PROC. § 3-701; *In re* Glenn, 54 Md. 572 (1880).

118. Maryland Rule 15-303(e)(3) provides, if a petition otherwise complies with the rules, the judge shall grant the writ unless "the legality of the confinement was determined in a prior habeas corpus or other post conviction proceeding, and no new ground is shown sufficient to warrant issuance of the writ." If a petitioner alleges new grounds, subsection (e)(3)(C) requires the petitioner to demonstrate "good reason why new grounds . . . were not raised in previous proceedings." If a previous judge has given the petitioner a hearing on a petition "for release from confinement under the same commitment," the subsequent judge has discretion to deny the writ. CTS. & JUD. PROC. § 3-703(a). "In exercising his discretion the judge may consider whether new grounds of a substantial nature appear to exist for granting of the writ or whether the grounds for the issuance of any former writ were fully and adequately presented." *Id.* In contrast, the PCPA contains a single-petition limitation and stricter waiver rules. *See infra* Parts III.C.1.c, III.C.1.h.

119. MD. R. 4-345. The rule also authorizes courts to revise sentences that are the products of "fraud, mistake, or irregularity," thus providing a remedy even when a sentence is not illegal. *Id.* 4-345(b).

120. State v. Kanaras, 357 Md. 170, 183, 742 A.2d 508, 516 (1999).

121. *Id.* at 184, 742 A.2d at 516.

122. State v. Griffiths, 338 Md. 485, 496-97, 659 A.2d 876, 882 (1995) (holding that the imposition of a sentence on a greater offense precluded a sentence for a lesser-included offense). The court in *Griffiths* suggested that there might be a constitutional requirement that Maryland provide a mechanism to challenge an unconstitutional sentence:

> In view of our holding that Maryland Rule 4-345(a) provides an adequate existing procedure for vacating the sentence imposed on the lesser offense, we need not consider whether the constitutional imperative to prevent multiple punishments

ceeded the maximum authorized by law, for example, because it was for a lesser-included offense and it exceeded the maximum sentence for the greater offense;[123] and (3) although the sentence was authorized by law, a court erred procedurally in imposing it, for example, by imposing a life sentence without realizing it had discretion to suspend all or part of that sentence.[124]

Given the special need for reliable and accurate decisionmaking in capital cases, the Court of Appeals has expanded the scope of motions to correct illegal sentences in capital cases. In *Evans v. State*,[125] the court noted its earlier holding that a capital defendant may allege in a Rule 4-345(a) motion that "an alleged error of constitutional dimension may have contributed to [a] death sentence, at least where the allegation of error is partly based upon a decision of the United States Supreme Court or of this Court rendered after the defendant's capital sentencing proceeding."[126] Evans contended in his motion that the trial court had applied at his sentencing hearing "an amendment to the Maryland death penalty statute" that "became effective a few months after the murders [for which he was convicted]," and that this "violated the *ex post facto* clauses of the United States and Maryland constitutions."[127] The court allowed Evans to assert this claim as an exception to the general rule that "a Rule 4-345(a) motion to cor-

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would mandate *vacatur* of the sentence even in the absence of a state procedure specifically authorizing that action.

Id. at 497 n.8, 659 A.2d at 882 n.8.

123. Gerald v. State, 299 Md. 138, 472 A.2d 977 (1984) (holding that, since the maximum sentence for robbery was ten years, the defendant, upon conviction of the lesser-included offense of assault, could not legally be sentenced to more than ten years).

124. State v. Chaney, 375 Md. 168, 174-75, 825 A.2d 452, 455 (2003) (considering "whether, on [the] record, the trial judge failed to recognize that he had the discretion to suspend all or a portion of the life sentence imposed in this case, and, if so, does that error require a new sentencing proceeding"). *Chaney* was filed under several procedural theories, but the appeal clarified that it was being prosecuted as a motion to correct an illegal sentence. *See* State v. Wooten, 277 Md. 114, 352 A.2d 829 (1976); *infra* note 135 and accompanying text; *see also* Randall Book Corp. v. State, 316 Md. 315, 558 A.2d 715 (1989) (holding that an appeal from a denial of a motion to correct an illegal sentence is not precluded by the PCPA when there has been no imprisonment, parole, or probation). The *Randall* court noted that arguments that sentences violate double jeopardy and constitute "cruel and unusual punishment[s]" are within the scope of a motion to correct an illegal sentence, but the contention that the trial judge "was motivated by impermissible considerations," is not within the scope of Rule 4-345. *Id.* at 322, 558 A.2d at 719.

125. 382 Md. 248, 855 A.2d 291 (2004).

126. *Id.* at 279, 855 A.2d at 309 (citing Oken v. State, 378 Md. 179, 835 A.2d 1105 (2003), *cert. denied*, 541 U.S. 1017 (2004)).

127. *Id.* at 251, 855 A.2d at 292-93.

rect an illegal sentence is not appropriate where the alleged illegality 'did not inhere in [the defendant's] sentence.'"[128]

The *Evans* court said it had established the death-penalty exception to this general principle in *Oken v. State.*[129] In *Oken*, the court, in a Rule 4-345 proceeding, considered and rejected the argument that Maryland's death penalty statute was unconstitutional because it does not require, before the jury imposes death, that the State prove beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances.[130] Both Oken and Evans based their arguments on Supreme Court decisions rendered after their capital sentencing proceedings.[131]

Maryland's appellate courts have narrowly described the scope of claims cognizable in a Rule 4-345 motion in a noncapital case. The court in *Evans*, for example, said: "A motion to correct an illegal sentence ordinarily can be granted only where there is some illegality in the sentence itself or where no sentence should have been imposed."[132] That is, "a trial court error during the sentencing proceeding is not ordinarily cognizable under Rule 4-345(a) where the resulting sentence or sanction is itself lawful."[133]

The scope, however, may be somewhat broader, as measured by the application of these principles. In *State v. Kanaras*,[134] a decision that the *Evans* court cites, the Court of Appeals allowed an appeal of a Rule 4-345 ruling on the question of whether an event subsequent to the imposition of sentence—Governor Glendening's refusal to consider parole for life-sentenced prisoners—retroactively changed life-with-parole into life-without-parole sentences, in violation of the prohibition of ex post facto laws. And, in *State v. Chaney*,[135] the court considered a case where the allegedly illegal sentence was within legal limits, but the trial court allegedly imposed the sentence without knowledge that it had the discretion to suspend all or part of it.

There are important procedural features of a Rule 4-345 motion that the other collateral remedies do not share. For example, the revisory power under the rule is not subject to the restrictions that govern

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128. *Id.* at 278, 855 A.2d at 309 (quoting State v. Kanaras, 357 Md. 170, 185, 742 A.2d 508, 517 (1999)).

129. 378 Md. 179, 835 A.2d 1105 (2003).

130. *Id.* at 184-85, 835 A.2d at 1108.

131. Oken relied on *Apprendi v. New Jersey*, 530 U.S. 166 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), and Evans relied on *Carmell v. Texas*, 529 U.S. 513 (2000).

132. *Evans*, 382 Md. at 278-79, 855 A.2d at 309.

133. *Id.* at 279, 855 A.2d at 309.

134. 357 Md. 170, 742 A.2d 508 (1999).

135. 375 Md. 168, 825 A.2d 452 (2003).

PCPA petitions. Although res judicata and law-of-the-case principles apply so courts need not entertain a successive motion that repeats allegations that a court previously has rejected,[136] there is no statute of limitations for filing the motion,[137] the waiver rules under the PCPA do not apply,[138] and there is a right of appeal from an adverse decision.[139]

On the other hand, unlike first-time postconviction proceedings, courts need not appoint counsel to represent parties who file motions to correct illegal sentences,[140] and although a court may not grant relief without holding a hearing, it can deny relief without doing so.[141]

C. *The Maryland Postconviction Procedure Act*

In 1958, Maryland became the second state to adopt the Uniform Post-Conviction Procedure Act (UPCPA).[142] The Act protected a

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136. *See* Scott v. State, 150 Md. App. 468, 474, 822 A.2d 472, 475 (2003) (holding that the court was not "required to consider anew repeated motions" that rested upon "the same facts" and allegations).

137. The rule specifically states that, as long as the sentence is illegal, the court may correct it "at any time." MD. R. 4-345(a); Mateen v. Saar, 376 Md. 385, 397, 829 A.2d 1007, 1014 (2003); *Kanaras*, 357 Md. at 180, 742 A.2d at 514 (stating that the "trial court clearly has the authority and responsibility to correct an illegal sentence at any time" (quoting Carter v. Warden, 210 Md. 657, 124 A.2d 574 (1956))).

138. *See* Walczak v. State, 302 Md. 422, 427, 488 A.2d 949, 951 (1985) ("[A] defendant who fails to object to the imposition of an illegal sentence . . . waive forever his right to challenge that sentence.").

139. In *Kanaras*, the court reexamined its inconsistent prior decisions about whether the losing party could appeal a decision on a motion to correct an illegal sentence. 357 Md. at 183, 742 A.2d at 516. The court disavowed those decisions in which it had indicated that the PCPA had abolished any right of appeal, noting that the language of the PCPA, which bars appeals from "*statutory remedies which have heretofore been available for challenging the validity of incarceration*," did not apply to motions to correct illegal sentences under Maryland Rule 4-345(a). *Id.* at 177, 742 A.2d at 512. The court quoted from Judge Eldridge's dissenting opinion in *Valentine v. State*, 305 Md. 108, 123, 501 A.2d 847, 854 (1985) (Eldridge, J., dissenting), in which he said "the fact that the Maryland Rules have the force of law does not mean that a rule is a statute." *Kanaras*, 357 Md. at 183, 742 A.2d at 516. The *Kanaras* opinion also pointed out that the PCPA barred appeals from actions that challenged "incarceration," and a motion to correct illegal sentence was neither an independent action, nor was it limited to sentences that imposed incarceration. *Id.* at 183-84, 742 A.2d at 516.

140. *See* MD. R. 4-214(b). A convicted defendant who moves for a *modification* of his sentence under 4-345(b) within the ninety-day period prescribed by that subsection has a statutory right to counsel. State v. Flansburg, 345 Md. 694, 702, 694 A.2d 462, 466 (1997).

141. Subsection (e)(2) of Rule 4-345 refers to the denial of a motion without a hearing and subsection (f) states that "[n]o hearing shall be held . . . until the court determines that the notice requirements in section (e)(2) of this Rule have been satisfied." MD. R. 4-345(e), (f).

142. Act of April 4, 1958, ch. 44, 1958 Md. Laws 178 (codified as amended at MD. CODE ANN., CRIM. PROC. §§ 7-101 to -301 (2004)). In 1955, the National Conference of Commissioners on Uniform State Laws originally adopted the Uniform Act. UNIF. POST-CONVICTION PROCEDURE ACT, 11A U.L.A. 267 (1995). The 1955 Act was superseded by the 1966

broad array of rights, placed limits on collateral litigation (especially through res judicata and "waiver" provisions), and took a step toward unifying the various collateral remedies by making the postconviction process the primary means of asserting collateral claims.[143] By giving state courts the first opportunity to adjudicate these claims, and by creating a fair adjudicatory process, the General Assembly provided a structure that would protect state decisions, and state sovereignty, during federal habeas review.

1. Central Provisions of the PCPA.—

a. Eligible Petitioners.—The original Act provided that "[a]ny person convicted of a crime and incarcerated under sentence of death or imprisonment . . . may institute a proceeding under this Act."[144] In 1965, the General Assembly added to the list of eligible petitioners people "on parole or probation."[145]

UNIF. POST-CONVICTION PROCEDURE ACT, 11A U.L.A. 274 (1995), which was superseded by the 1980 UNIF. POST-CONVICTION PROCEDURE ACT, 11 U.L.A. 249 (1995). The 1980 Act allows "[a] person convicted of and sentenced for a crime" to "institute a proceeding applying for relief" upon one of eight grounds. 1980 UNIF. POST-CONVICTION PROCEDURE ACT § 1(a), 11 U.L.A. at 249-50.

143. *See generally* Tomlinson, *supra* note 5; Alexander, *supra* note 107. Today, every state provides convicted defendants with at least one type of postconviction remedy; many provide multiple remedies. *See generally* WILKES, *supra* note 4, at 16-30. Fifteen states have enacted some version of the UPCPA, and these acts remain in force in twelve of those fifteen states. As of July 2004, the ten states that currently have some statutory version of the UPCPA are Maryland, Montana, Oregon (primarily based on the original 1955 version of the UPCPA); Idaho, Iowa, Minnesota, Oklahoma, Rhode Island, and South Carolina (primarily based on the 1966 revision); and North Dakota (primarily based on the 1980 revision). MD. CODE ANN., CRIM. PROC. §§ 7-101 to -301; MONT. CODE ANN., §§ 46-21-101 to -111 (2003); OR. REV. STAT. §§ 138.005-.504. (2005); IDAHO CODE §§ 19-4901 to -4911 (Michie 2004); IOWA CODE ANN. §§ 822.1-.11 (West 2003); MINN. STAT. ANN. §§ 590.01-.06 (West 2005); OKLA. STAT. ANN. tit. 57, § 332 (2004); R.I. GEN. LAWS §§ 10-9.1-1 to -12 (2004); S.C. CODE ANN. §§ 17-27-10 to -160 (Law. Co-op. 2004); N.D. CENT. CODE §§ 29-32.1-01 to -14 (2003). Additionally, Arkansas, Nevada and South Dakota enacted versions of the UPCPA, but then repealed them. Wilkes points out that two additional states, Alaska and Indiana, have adopted some form of the UPCPA by court rule. WILKES, *supra* note 4, at 214; *see* ALASKA R. 35.1; IND. R. PC1.

144. § 645A(a), 1958 Md. Laws at 179.

145. Act of April 8, 1965, ch. 442, § 645A(a), 1965 Md. Laws 634, 634. In *McMannis v. State*, the Court of Appeals held that a West Virginia prisoner whose sentence was enhanced under that state's recidivist statute, but predicated on an earlier Maryland conviction, could not use Maryland's PCPA to challenge the earlier sentence. 311 Md. 534, 536 A.2d 652 (1988). The court noted that to invoke the PCPA, one had to be in Maryland's custody, i.e., incarcerated or on parole or probation in Maryland. *Id.* at 539, 536 A.2d at 654. The court declined to broadly construe the custody requirement, despite the expansive interpretation of similar federal statutes by federal courts, saying that

> where a person in another state has fully served a sentence imposed by Maryland and is in no sense being detained by, or at the direction of, Maryland, the challenge to an earlier Maryland conviction that is having some collateral, albeit sig-

b. Claims Within the Scope of the Act.—The Act consolidated the collateral process by bringing within it claims that had been cognizable under habeas corpus and other common-law writs. Under the original Act, petitioners could assert

> that the [trial] court was without jurisdiction to impose the sentence, or that the sentence exceeds the maximum authorized by law, or that the sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy.[146]

The current Act contains these provisions with minor nonsubstantive revisions.[147]

Most important, in enacting the PCPA, the General Assembly also expanded the scope of collateral relief by providing that petitioners could allege "that the sentence or judgment was imposed in violation of the Constitution of the United States or the Constitution or laws of this State."[148] This liberated the collateral remedy from its habeas history, which initially had allowed relief only when convictions were nullities. It gave the state courts the mechanism they needed to provide more complete relief to collateral petitioners, including relief that implemented federal court decisions, and thereby helped to protect state court decisions in federal habeas corpus proceedings.

The original grounds for postconviction relief remain the grounds for relief under the Act today.[149]

c. The Number of Permissible Petitions.—Over thirty-seven years, the General Assembly has reduced the number of petitions one could file from unlimited to two,[150] to one with an opportunity to reopen "in the interests of justice."[151] The articulated goal, as it has

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> nificant, consequence upon the petitioner's imprisonment because of the law of the state of imprisonment should more properly be brought in the state that confines him.

Id. at 541-42, 543, 536 A.2d at 656.

146. § 645A(a), 1958 Md. Laws at 179.

147. CRIM. PROC. § 7-102 (a)(2)-(4). As discussed in Part II, the PCPA did not eliminate the writ of habeas corpus nor any of the other common-law and statutory collateral remedies, but it moved towards a unified system by abolishing the right of appeal for those remedies that "have heretofore been available for challenging the validity of incarceration under sentence of death or imprisonment" when petitioners used them to assert claims cognizable under the PCPA. § 645A(b), 1958 Md. Laws at 179.

148. § 645A(a), 1958 Md. Laws at 179.

149. CRIM. PROC. § 7-102.

150. Act of May 27, 1986, ch. 647, 1986 Md. Laws 2387, 2388.

151. CRIM. PROC. §§ 7-103, 7-104. The one-petition-only amendment, with the "interests of justice" reopening caveat, was enacted in 1995. *See infra* Part IV.B.

been with federal habeas corpus, has been to give petitioners one full and fair opportunity to litigate their collateral claims.

"As originally enacted in 1958, the Act did not place any limit on the number of post conviction petitions which a petitioner was entitled to file."[152] The original Act contained a provision, repealed in 1965 as part of a series of amendments,[153] which provided:

> All grounds for relief claimed by a petitioner under this Act must be raised in his original or amended petition, and any grounds not so raised are waived unless the court on hearing a subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.[154]

This original provision is interesting because it resembles the basic structure of the current Act. Under the original Act, the petitioner could file an original and amended petition, and could file a subsequent petition if the claims in the second petition "could not reasonably have been raised" before.[155] Today, a petitioner can file a single petition, with "freely allowed" amendments "in order to do substantial justice,"[156] and can subsequently reopen that proceeding if "the interests of justice" warrant it.[157]

In 1986, the General Assembly limited the number of petitions a prisoner could file to two.[158] The Court of Appeals held that the new two-petition-only provision could not be applied retroactively.[159]

In 1995, the General Assembly reduced from two to one the number of postconviction petitions that a petitioner can file but added the "interests of justice" reopening provision noted above.[160] In Part IV.B, I trace the legislative history of this provision, and make some suggestions about how courts might interpret it.

d. Statutes of Limitations.—The original Act had no statute of limitations. It provided that a petition could "be filed at any time."[161]

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152. Mason v. State, 309 Md. 215, 217-18, 522 A.2d 1344, 1345 (1987).

153. Act of April 8, 1965, ch. 442, § 2, 1965 Md. Laws 634, 636; *see infra* Part III.C.1.h.

154. § 645H, 1958 Md. Laws at 181.

155. *Id.* The General Assembly deleted this provision in 1965 when it added new waiver provisions to the Act. 1965 Md. Laws at 634; *see* Tomlinson, *supra* note 5, at 951-53.

156. MD. R. 4-402(c).

157. MD. CODE ANN., CRIM. PROC. § 7-104 (2004).

158. Act of May 27, 1986, ch. 647, 1986 Md. Laws 2387, 2388.

159. Mason v. State, 309 Md. 215, 221-22, 522 A.2d 1344, 1347 (1987).

160. Act of April 11, 1995, ch. 258, 1995 Md. Laws 1473, 1482. For the effect of these amendments on prisoners who had filed previous petitions, see *Grayson v. State*, 354 Md. 1, 728 A.2d 1280 (1999).

161. Act of April 4, 1958, ch. 44, § 645A(b), 1958 Md. Laws 178, 179.

In 1991, the General Assembly established a statute of limitations for filing initial capital postconviction petitions, requiring that they be filed 240 days after decision by the United States Supreme Court on direct appeal (either affirming the death sentence or denying certiorari), or the expiration of the time for seeking certiorari from the Supreme Court on direct appeal.[162] The new provisions authorized a court to extend time for filing an initial capital postconviction petition for good cause.[163]

The 1991 General Assembly rejected a proposed three-year statute of limitations for filing noncapital postconviction petitions.[164]

In 1995, the General Assembly imposed a ten-year statute of limitations for noncapital postconviction petitions, absent "extraordinary cause," but gave that provision prospective effect only.[165]

The 1995 revisions also reduced from 240 to 210 days the period of time a death-sentenced prisoner has to file his initial petition,[166] established the ground rules for capital offenders who wish to waive their rights to file postconviction petitions,[167] and established or modified timelines for the litigation of capital postconviction proceedings.[168]

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162. Act of May 24, 1991, ch. 499, § 645A(a)(3), 1991 Md. Laws 2992, 2996. The initial proposal for the statute of limitations was 180 days. *See id.* at 2995.

163. *Id.* at 2996.

164. The proposed provision, which was deleted by amendment, provided: "[A] petition shall be filed within 3 years after the challenged conviction has become final unless extraordinary cause for the delay is shown." *See id.* at 2995. It made an exception for new decisions to be applied retroactively. *Id.* at 2997.

165. In 1995, the General Assembly amended subsection (a)(2) of § 645A. Act of May 9, 1995, ch. 258, 1995 Md. Laws 2091, 2091-92. As amended, it provided: "Unless extraordinary cause is shown, in a case in which a sentence of death has not been imposed, a petition under this subtitle may not be filed later than 10 years from the imposition of sentence," and "[t]hat this Act shall be construed prospectively to apply only to postconviction proceedings for sentences imposed on or after the effective date of this Act [October 1, 1995] and may not be applied or interpreted to have any effect on or application to postconviction petitions for sentences imposed before the effective date of this Act." *Id.* at 2091-92. In *Grayson v. State*, the Court of Appeals held that the prohibition against filing a petition more than ten years after sentencing did not apply to a sentence that was imposed in 1966, making it clear that the latter provision means exactly what it appears to say. 354 Md. 1, 15, 728 A.2d 1280, 1286 (1999).

166. § 645A(a)(3), 1995 Md. Laws at 1482.

167. § 645A(a)(5), 1995 Md. Laws at 1483. This provision states that a defendant in a case where a death sentence has been imposed may waive his right to a postconviction petition. *Id.* Such a waiver must be "[k]nowing, voluntary, intelligent; and . . . in writing," and the defendant may revoke such a waiver if he does so within fifteen days. *Id.*

168. § 645A(g), 1995 Md. Laws at 1485. The capital prisoner's hearing must be set within thirty days after the petition is filed, and must take place within ninety days after the petition is filed. *Id.*

e. Rights to Appointed Counsel and a Hearing.—The original Act required that a court appoint counsel to represent indigent petitioners,[169] and contained ambiguous language about whether a hearing was mandatory.[170] The Act did not specify how courts should deal with multiple petitions.

In 1959, the General Assembly addressed this issue by authorizing a court, after considering the State's response to a subsequent petition, to dismiss that petition without appointing counsel or holding a hearing if the court found that the petition contained no ground for relief that "could not reasonably have been raised in the original or amended petition."[171]

In 1983, the General Assembly made it clear that a hearing and appointment of counsel for the first petition were mandatory. It added language to the Act providing that: "A petitioner is entitled to the assistance of counsel and a hearing on the first petition filed by the petitioner under this section."[172] Addressing subsequent petitions, it said: "The court shall determine whether to grant assistance of counsel or a hearing on subsequent petitions."[173]

In 1986, when the General Assembly limited the number of petitions a prisoner could file to two, it authorized, but did not require, a court to appoint counsel and hold a hearing on a "subsequent" (i.e., second) petition.[174]

Similarly, in 1995, when the General Assembly reduced from two to one the number of postconviction petitions that a petitioner can file, and authorized courts to "reopen a postconviction proceeding that was previously concluded if the court determines that such action is in the interests of justice," it left within a court's discretion whether, on a motion to reopen, it should appoint counsel to represent a petitioner and hold a hearing.[175]

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169. Act of April 4, 1958, ch. 44, § 645E, 1958 Md. Laws 178, 180.

170. *Id.* § 645G, 1958 Md. Laws 180-81. The Act precluded the trial judge from hearing the postconviction petition unless the petitioner consented to this. *Id.* Maryland Rule 4-406 now contains this provision.

171. Act of April 8, 1959, ch. 429, § 645H, 1959 Md. Laws 558, 560.

172. Act of May 10, 1983, ch. 234, § 645A(f), 1983 Md. Laws 910, 911.

173. *Id.*

174. Act of May 27, 1986, ch. 647, § 645A(f), 1986 Md. Laws 2387, 2388.

175. Act of April 11, 1995, ch. 110, § 645A(a)(2), 1995 Md. Laws 1473, 1482. The original Act authorized the court to "receive proof by affidavits, depositions, oral testimony, or other evidence." § 645G, 1958 Md. Laws at 181. This provision is now contained in Maryland Rule 4-406(c). In Part IV.A, I argue that by authorizing proof by deposition, the General Assembly intended to give courts discretion to allow at least limited discovery in postconviction cases.

f. The Qualified Right to Appeal.—The original Act provided for a discretionary appeal to the Court of Appeals, then Maryland's only appellate court.[176]

In 1966, the General Assembly amended the Act to divide responsibility for appeals between the Court of Appeals and the then-new Court of Special Appeals. It vested sole jurisdiction in the Court of Special Appeals to hear appeals in noncapital postconviction cases, by leave of court, and sole jurisdiction in the Court of Appeals to hear appeals in capital postconviction cases, by leave of court.[177] Current law remains the same.[178] In construing the applicable provisions, the Court of Appeals has drawn an important distinction: When the Court of Special Appeals exercises its discretion either to grant or deny an appeal, the Court of Appeals may not review that discretionary judgment. However, when the Court of Special Appeals grants leave to appeal and decides the appeal, the Court of Appeals, through its certiorari power, may review, on the merits, that appellate decision.[179]

g. Res Judicata.—The original Act conditioned the right of petitioners to bring a claim on the requirement that it "has not been previously and finally litigated."[180] In 1965, the General Assembly added clarifying language.[181] It separated prior court decisions into appellate and trial decisions. With respect to appellate decisions, it said that "an allegation of error shall be deemed to be finally litigated

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176. Such an appeal could be requested by filing an "appl[ication] . . . for leave to prosecute an appeal." § 645I, 1958 Md. Laws at 181. The Act provided that if the "application is denied, the order sought to be reviewed shall thereby become final to the same extent and with the same effect as if said order had been affirmed on appeal." *Id.*

177. Act of March 23, 1966, ch. 12, § 645I, 1966 Md. Laws 23, 33. The General Assembly deleted language from section 645I that provided that a denial of leave to appeal was a final order "to the same extent and with the same effect as if said order had been affirmed on appeal." *Id.* In 1976, the General Assembly removed references to appeals to the Court of Appeals from the Act. Act of May 4, 1976, ch. 472, § 645A(e), 1976 Md. Laws 1234, 1243.

178. *See* MD. CODE ANN., CRIM. PROC. § 7-109 (2004); *see also* MD. CODE ANN., CTS. & JUD. PROC. § 12-202 (2004) (providing that "review by way of certiorari may not be granted by the Court of Appeals in a case or proceeding in which the Court of Special Appeals has denied or granted: (1) Leave to prosecute an appeal in a post conviction proceeding").

179. Grayson v. State, 354 Md. 1, 11, 728 A.2d 1280, 1285 (1999).

180. § 645A(a), 1958 Md. Laws at 179.

181. There were several decisions prior to 1965 dealing with the "finally litigated" and "waiver" issues. *See, e.g.*, Rudolph v. Warden, 217 F. Supp. 579 (D. Md. 1963) (questioning whether after the repeal by the PCPA of the right to seek leave to appeal habeas decisions, the denial on procedural grounds of a Maryland prisoner's claim meant that the claim had been "finally litigated"); Plater v. Warden, 220 Md. 673, 673, 154 A.2d 811, 811 (1959) (holding that an issue raised in a postconviction proceeding had been "finally litigated" in a prior habeas corpus proceeding when the Court of Appeals denied leave to appeal the lower court's denial of relief, thereby affirming that judgment).

when the Court of Appeals has rendered a decision on the merits thereof, *either upon direct appeal or upon any consideration of an application for leave to appeal* filed [under the Act]."[182] The language is somewhat confusing because denial of discretionary review is not usually considered to be a decision "on the merits." Maryland's appellate courts have not squarely resolved whether a denial of leave to appeal means that the claims in it have been "previously and finally litigated." The Court of Special Appeals, however, has held that claims in a previous postconviction decision have not been "finally litigated" when the petitioner did not seek leave to appeal.[183]

If denial of leave to appeal satisfies the "finally decided" test, this should be a relatively weak form of res judicata. In later determining whether to reopen a prior postconviction proceeding, a court should keep in mind that there is no statutory requirement that counsel represent indigent prisoners who seek leave to appeal from adverse decisions. This leaves to indigent prisoners the task of preparing appellate papers in many, often complex cases.

Also, the Maryland Rule governing "application[s] for leave to appeal [postconviction decisions] to [the] Court of Special Appeals" does not require, or allow, applicants to file the transcript of a postconviction proceeding, but only the pleadings in the case and the often sparse conclusions of the circuit court.[184] This may make it difficult for the appellate court to identify with reliability and accuracy errors made by the lower court.

Furthermore, as with other discretionary decisions, like those on certiorari, a decision to deny leave to appeal in a postconviction case may reflect a variety of judgments unrelated to the merits of the issues, and once the Court of Special Appeals has exercised its discre-

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182. Act of April 8, 1965, ch. 442, § 645A(b), 1965 Md. Laws 634, 635 (emphasis reflects new language). The comparable provision today is in MD. CODE ANN., CRIM. PROC. § 7-106(a)(1), which provides: "For the purposes of this title, an allegation of error is finally litigated when: (1) an appellate court of the State decides on the merits of the allegation: (i) on direct appeal; or (ii) on any consideration of an application for leave to appeal filed under [the Act]."

183. In *Hadder v. Warden*, the Court of Special Appeals held, consistent with the plain meaning of the text of section 645A(b), that when a postconviction petitioner lost, but did not seek leave to appeal, the claims in that proceeding had not been "finally litigated." 7 Md. App. 584, 587, 256 A.2d 549, 551 (1969). Reciting the language of section 645A(b), the court said that "a contention cannot be deemed to have been 'finally litigated' where there has been no decision on the merits thereof by the Court of Appeals or this Court either upon direct appeal or upon consideration for leave to appeal." *Id.*; *accord* Sample v. Warden, 6 Md. App. 103, 106-07, 250 A.2d 269, 271 (1969).

184. MD. R. 8-204(c).

tion, and denied leave to appeal, the Court of Appeals has no jurisdiction to review that decision.[185]

h. Waivers of Claims and Exceptions to Waiver.—In overview form, there is "a two-tier waiver rule that is part statutory and part common law."[186]

The first tier includes claims based on rights that are "fundamental."[187] The waiver rule for this tier is found in the Act. Under the text of the Act, a petitioner has waived a claim when that petitioner "could have made but intelligently and knowingly failed to make the allegation" in a prior proceeding.[188] Before this text was interpreted by the Maryland Court of Appeals, it appeared to mean that absent an informed and personal waiver by the petitioner, *all* claims were preserved. As interpreted, however, the "intelligently and knowingly" requirement applies only to claims based on a limited category of "fundamental rights."[189] These rights include those "for which the United States Supreme Court has required an express, knowing, and intelligent waiver."[190]

The second-tier rules—those governing the waiver of claims based on nonfundamental rights—are to be found outside the Act, in "case law or any pertinent statutes or rules."[191] These rules generally provide that actions and omissions of the lawyer bind the client, including procedural defaults.[192]

I now turn to the history of the waiver rules and a more detailed discussion of these two-tier rules, including the exceptions to waiver.

The original Act precluded a petitioner from asserting an error that had been "waived in the proceedings resulting in the conviction, or in any other proceeding that the petitioner has taken to secure relief from his conviction."[193] The Act did not define "waived."

In 1965, the General Assembly substantially revised the waiver provision[194] in response to the Supreme Court's decision in *Fay v.*

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185. CRIM. PROC. § 7-109(b)(4).

186. Baker v. Corcoran, 220 F.3d 276, 289 (4th Cir. 2000).

187. *Id.* at 289-90.

188. CRIM. PROC. § 7-106(b)(1)(i).

189. Curtis v. State, 284 Md. 132, 149, 395 A.2d 464, 474 (1978).

190. *Baker*, 220 F.3d at 290 (citing McElroy v. State, 329 Md. 136, 139-40, 617 A.2d 1068, 1070 (1993)); *see infra* Part III.C.1.h(2).

191. *Curtis*, 284 Md. at 149-50, 395 A.2d at 474.

192. *See infra* Part III.C.1.h(2).

193. Act of April 4, 1958, ch. 44, § 645A(a), 1958 Md. Laws 178, 179.

194. Act of April 8, 1965, ch. 442, § 645A(c), 1965 Md. Laws 634, 635.

Noia.[195] In *Fay*, the Court addressed "under what circumstances, if any, the failure of a state prisoner to comply with a state procedural requirement, as a result of which the state courts decline to pass on the merits of his federal defense, bars subsequent resort to the federal courts for relief on habeas corpus."[196] The Court held that a federal court had "limited discretion" to deny habeas relief to an applicant, but only to one "who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies."[197] The Court said: "The classic definition of waiver enunciated in *Johnson* v. *Zerbst*—'an intentional relinquishment or abandonment of a known right or privilege'—furnishes the controlling standard."[198] The Court emphasized that, in order to satisfy the waiver standard, it must be *the petitioner* who, "after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures."[199] Therefore, "[a] choice made by counsel not participated in by the petitioner does not automatically bar relief. Nor does a state court's finding of waiver bar independent determination of the question by the federal courts on habeas, for waiver affecting federal rights is a federal question."[200]

The 1965 amendments to the Act had four basic components. First, they incorporated the *Johnson v. Zerbst* standard: "[A]n allegation of error shall be deemed to be waived when a petitioner could have made, but intelligently and knowingly failed to make, such allegation" in prior proceedings.[201]

Second, they created a rebuttable presumption that if "an allegation of error could have been made by a petitioner" in a prior pro-

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195. 372 U.S. 391 (1963). The legislative purpose underlying these revisions by the General Assembly was "to adopt the concept of 'waiver' set forth by the Supreme Court in cases like *Johnson v. Zerbst* and *Fay v. Noia.*" *Curtis*, 284 Md. at 142, 395 A.2d at 470 (citations omitted). The votes on the final bill, H.B. 901, were unanimous in both the House of Delegates (117-0) and Senate (29-0). *See* 1965 MD. HOUSE JOURNAL 1655; 1965 MD. SENATE JOURNAL 1559.

196. *Fay*, 372 U.S. at 399.

197. *Id.* at 438.

198. *Id.* at 439 (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

199. *Id.*

200. *Id.* Subsequent to *Fay*, the Supreme Court, in *Wainwright v. Sykes*, 433 U.S. 72 (1977), and Congress, *see supra* Part II.B, abandoned the *Fay* waiver standard.

201. Act of April 8, 1965, ch. 442, § 645A(c), 1965 Md. Laws 634, 635. The prior proceedings were "before trial, at trial, on direct appeal (whether or not said petitioner actually took such an appeal), in any habeas corpus or coram nobis proceeding actually instituted by said petitioner, in a prior petition under this subtitle, or in any other proceeding actually instituted by said petitioner." *Id.*

ceeding, "but was not in fact so made," the "petitioner intelligently and knowingly failed to make such allegation."[202]

Third, they added a forgiveness provision, authorizing a court to excuse a waiver and resolve a claim on the merits if the petitioner proves the existence of special circumstances.[203]

Fourth, they added a broad exception to both the waiver and "finally litigated" provisions for new constitutional standards developed by the Supreme Court or either of Maryland's appellate courts, which apply "retrospectively" and "affect the validity of the petitioner's conviction or sentence."[204]

With largely nonsubstantive changes, these provisions remain in effect today.[205] The judicial interpretations of these rules, however, have added important glosses to the legislative text.

(1) Limiting the Statutory Waiver Definition to Claims Based on Fundamental Rights.—In 1978, in *Curtis v. State*,[206] the Court of Appeals held that the 1965 amendments defining "waiver" applied only to claims based on "certain basic constitutional rights under circumstances where the courts have held that only such intelligent and knowing action will bind the defendant."[207] To waive a claim based on such a fundamental right, petitioners themselves must intelligently and knowingly relinquish the claim in an on-the-record proceed-

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202. *Id.*

203. *Id.*

204. *Id.* § 645A(d), 1965 Md. Laws at 635.

205. *See* MD. CODE ANN., CRIM. PROC., § 7-106 (2004). To reflect changes in Maryland criminal procedure, the current law has added to the proceedings in which a petitioner might have waived a claim, "an application for leave to appeal a conviction based on a guilty plea." *Id.* § 7-106(b)(1)(i)(4).

206. 284 Md. 132, 395 A.2d 464 (1978).

207. *Id.* at 148, 395 A.2d at 473. Curtis had filed a second postconviction petition in which, for the first time, he argued that he had received constitutionally ineffective assistance of counsel from his trial, appellate, and first postconviction lawyers. *Id.* at 134, 395 A.2d at 466. The parties stipulated that Curtis had "a seventh grade education and an I.Q. of 72 (borderline range of intelligence)"; that there was evidence that he "was a chronic alcoholic who had suffered some brain damage as a result of extended drinking for nineteen (19) years"; that he "relied entirely on his court-appointed counsel at trial, on direct appeal . . . and in his first post-conviction case"; and that he "would have raised the issue of ineffective assistance of counsel in his prior post-conviction case had [he] known that there was a possible issue of ineffective assistance of counsel." *Id.* at 136, 395 A.2d at 467. The Court of Special Appeals held that Curtis had waived the argument that trial counsel was ineffective by failing to assert it in his first postconviction proceeding and had not proved either that his first postconviction lawyer was ineffective or that there were special circumstances to excuse the waiver. *Id.* at 137, 395 A.2d at 467.

ing.[208] The "failure of counsel or an unknowing petitioner to raise [such] an issue" is not a "waiver."[209]

The court held that Curtis's claim, based on the Sixth Amendment right to the effective assistance of counsel, is a first-tier claim and therefore "is governed by the *Johnson v. Zerbst* standard of an 'intelligent and knowing' waiver."[210] The statutory presumption of waiver, the court said, "can be rebutted by evidence or stipulated facts showing that petitioner did not 'intelligently and knowingly' fail to raise the issue previously."[211] The facts rebutted the presumption in Curtis's case; he was therefore allowed to assert his claims.

The court adopted its two-tier approach from a line of Supreme Court decisions in which the court sometimes applied the *Johnson v. Zerbst* and *Fay v. Noia* waiver standards, and sometimes did not, "depend[ing] upon the nature of the right and the surrounding circumstances" in each case.[212] The court concluded that the Maryland General Assembly "intended that the [section 645A(c)] waiver provision . . . , with its express definition of waiver, be applicable only in those situations where the courts have required an 'intelligent and knowing' standard."[213] To hold otherwise, the opinion said, would mean that

> every time counsel made a tactical decision or a procedural default occurred, the result could be chaotic. For example, under such an interpretation of the statute, for a criminal defendant to be bound by his lawyer's actions, the lawyer would have to interrupt a trial repeatedly and go through countless litanies with his client.[214]

In *Wyche v. State*,[215] the Court of Special Appeals said: "Fundamental rights [within the meaning of the PCPA] have been defined as

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208. In *Wyche v. State*, the court set forth a two-prong test for finding an "intelligent" and "knowing" waiver: "1. The record expressly reflects that the defendant had a basic understanding of the nature of the right which was relinquished or abandoned; and 2. The record expressly reflects acknowledgement that the relinquishment or abandonment of that right was made or agreed to by the defendant." 53 Md. App. 403, 406, 454 A.2d 378, 379 (1983).

209. *Curtis*, 284 Md. at 139, 395 A.2d at 469. The *Curtis* opinion said that "the standard of 'waiver' for purposes of the Act is whether 'the petitioner himself "intelligently and knowingly" failed to raise the issue' or, stated another way, whether he was previously 'aware of and understood the possible defense.'" *Id.* at 140, 395 A.2d at 469.

210. *Id.* at 150, 395 A.2d at 474.

211. *Id.* at 139, 395 A.2d at 469.

212. *Id.* at 147, 395 A.2d at 473.

213. *Id.* at 148, 395 A.2d at 473.

214. *Id.* at 149, 395 A.2d at 474.

215. 53 Md. App. 403, 454 A.2d 378 (1983).

being, almost without exception, basic rights of a constitutional origin, whether federal or state, that have been guaranteed to a criminal defendant in order to preserve a fair trial and the reliability of the truth-determining process."[216] The court's list of "rights that have been deemed fundamental" included

> the right to counsel, the right to trial by jury, the right to be properly advised before the acceptance of a guilty plea, the right not to be compelled to give self-incriminating evidence, the right against double jeopardy, the right to confrontation, the right to a speedy trial, and the right to counsel at a post indictment pre-trial line up, as well as "the right to effective assistance of counsel at a criminal trial."[217]

Even if petitioner has personally—and knowingly and intelligently—waived a claim based on a fundamental right, a court can excuse that waiver if the petitioner demonstrates "special circumstances" for excuse.[218] This is, however, a separate, second step in the analysis, as the court in *Curtis* emphasized: "Where the record affirmatively shows that there was not an intelligent and knowing failure to raise [the issue], there is nothing to 'excuse,' and the presence or absence of 'special circumstances' has no relevance."[219]

(2) The Waiver Rules That Apply to Claims Based on Rights That Are Not Fundamental, and the Exceptions to These Rules.—The Court of Appeals in *Curtis* said that these second-tier claims are "to be governed by case law or any pertinent statutes or rules,"[220] and added: "Tactical decisions, when made by an authorized competent attorney, as well as legitimate procedural requirements, will normally bind a criminal defendant."[221] Maryland's appellate courts have spent sev-

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216. *Id.* at 406, 454 A.2d at 380.

217. *Id.* (citations omitted). The court in *Wyche* apparently included in its reference to the right of confrontation the right recognized in *Williams v. State*, 292 Md. 201, 438 A.2d 1301 (1981), of criminal defendants to be present at every stage of their trial, including at a bench conference at which voir dire is conducted or a venire panel juror is excused. *Wyche*, 53 Md. App. at 408, 454 A.2d at 380-81. The Court of Appeals said this right "is a common law right, is to some extent protected by the Fourteenth Amendment to the United States Constitution, and is guaranteed by Maryland Rule 724." *Williams*, 292 Md. at 211, 438 A.2d at 1306.

218. MD. CODE ANN., CRIM. PROC. §7-106 (b)(1)(ii) (2004).

219. *Curtis*, 284 Md. at 139, 395 A.2d at 468.

220. *Id.* at 149-50, 395 A.2d at 474.

221. *Id.* at 150, 395 A.2d at 474.

eral decades trying to identify the exceptions to these general waiver principles.[222]

In *Walker v. State*,[223] the Court of Appeals summarized its prior decisions by stating that "a court, in a post conviction proceeding, can *excuse* a waiver [of a nonfundamental right] based upon an earlier procedural default if the *circumstances warrant such action.*"[224] Walker had alleged, in his third postconviction petition, "that the trial court incorrectly instructed the jury that an intent to inflict severe injury was sufficient to support a conviction for assault with intent to murder, and that this error permitted the State to obtain his conviction without proving every element of the offense beyond a reasonable doubt."[225] His trial lawyer, however, had not objected to the instruction.

To overcome this procedural default, and his failures to challenge the instruction in his prior proceedings, Walker argued that the waiver issue was governed by section 645A(c).[226] The opinion recognized that the rules that authorize "a court to take cognizance of 'plain error' despite the waiver of an issue, literally apply only to direct appellate review of a judgment."[227] The Court of Appeals also acknowledged that "the similar 'special circumstances'" exception to waiver, "set forth in [the PCPA]," applies only to "situations requiring intelligent and knowing action before there is a waiver," i.e., waivers of fundamental rights claims.[228]

The court, nevertheless, said that "[i]n effect, we have upheld the application of the 'plain error' or 'special circumstances' principles to

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222. *See* Cirincione v. State, 119 Md. App. 471, 512-17, 705 A.2d 96, 116-18 (1998) (surveying the applicable case law).

223. 343 Md. 629, 684 A.2d 429 (1996).

224. *Id.* at 647-48, 684 A.2d at 438 (emphasis added); *accord* Oken v. State, 343 Md. 256, 273, 681 A.2d 30, 38 (1996) ("this Court retains discretion to excuse waiver" at a postconviction proceeding).

225. *Walker*, 343 Md. at 633, 684 A.2d at 431.

226. *See id.* at 635, 684 A.2d at 432 (noting the circuit court's application of the "knowing and intelligent waiver" and the "special circumstances" standards). The circuit court excused the waivers, finding both "plain error" and "special circumstances." *Id.* The special circumstances were that "at the time of Walker's trial, the law concerning the intent element of assault with intent to murder was misunderstood by trial judges and lawyers, and that the law was not finally clarified until . . . more than five years after Walker's conviction became final." *Id.* The circuit court also found that Walker had a fundamental right to the proper instruction, which he had not personally, knowingly, and intelligently waived. *Id.* The Court of Appeals rejected this argument, reiterating that "the failure to object to or otherwise challenge a jury instruction constitutes a waiver of the issue for purposes of the Maryland Post Conviction Procedure Act." *Id.* at 645, 684 A.2d at 437.

227. *Id.* at 647, 684 A.2d at 438 (referring to MD. R. 4-325(e), 8-131(a)).

228. *Id.*

waivers of [nonfundamental rights]."[229] Although the Court of Appeals held that Walker could assert these exceptions to waiver on post-conviction, it found that the principles were inapplicable to the circumstances of his case.[230]

In sum, the "plain error" exception to waiver is applicable in post-conviction cases, as is the "special circumstances" exception. Although the latter exception is not as well-developed as the former,[231] the Court of Appeals has said that "special circumstances" may exist when defense counsel fails to preserve error because of a "misconception by a large segment of the bench and the bar" about the governing law.[232]

In addition to the "plain error" and "special circumstances" exceptions to waiver, there are two other "exceptions," broadly conceived, to the waiver of claims based on both fundamental and nonfundamental rights: (1) the PCPA provision that gives petitioners the benefit of new constitutional standards announced by the Supreme Court or a Maryland appellate court and applied retroac-

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229. *Id.* at 648, 684 A.2d at 438.

230. *Id.* at 650, 684 A.2d at 439.

231. *See, e.g.*, Richmond v. State, 330 Md. 223, 237, 623 A.2d 632, 636 (1993) (holding that it was plain error to fail to instruct jury that the prosecution was required to prove specific intent); Squire v. State, 280 Md. 132, 135-36, 368 A.2d 1019, 1020-21 (1977) (holding that a change in law due to an intervening Supreme Court decision justified use of the plain error doctrine to review a constitutionally deficient instruction); State v. Evans, 278 Md. 197, 211-12, 362 A.2d 629, 637-38 (1976) (same); Brooks v. State, 68 Md. App. 604, 613-14, 515 A.2d 225, 230-31 (1986) (finding plain error in a jury instruction allowing reckless or wanton disregard to satisfy the mens rea requirement for conviction for malicious destruction of property).

232. *Walker*, 343 Md. at 648, 684 A.2d at 438. The Court of Appeals explained in *Walker* that it had held in *Franklin v. State*, 319 Md. 116, 511 A.2d 1208 (1990), that the failure to object to an erroneous jury instruction should be excused because of the "misconception by a large segment of the bench and the bar concerning the intent element of assault with intent to murder." *Walker*, 343 Md. at 648, 684 A.2d at 438. The *Walker* opinion noted that the lower court had "held that this same misconception should excuse the failure to object at Walker's trial." *Id.* It said: "We assume that, if the circumstances in the present case were similar to those in *Franklin*, the circuit court's decision excusing Walker's waiver of the jury instruction issue would have been warranted. The circumstances in the two cases, however, were not at all comparable." *Id.* at 648-49, 684 A.2d at 438; *see also* Parker v. State, 4 Md. App. 62, 67, 241 A.2d 185, 188 (1968) (holding that waiver should be excused because appellant's failure to object to an erroneous instruction was neither "a bad guess [n]or a trial tactic but resulted rather from a misunderstanding of the applicable law—a misunderstanding also shared by the court, and by the State"). *But see* Hunt v. State, 345 Md. 122, 151-52, 691 A.2d 1255, 1269 (1997) (finding that there had been no change in law that excused the failure of counsel to preserve a legal argument); Oken v. State, 343 Md. 256, 272-73, 681 A.2d 30, 38 (1996) (noting that the law was clearly established at the time that counsel failed to object to jury voir dire, and counsel deliberately failed to raise the matter on appeal as a tactical matter).

tively,[233] and (2) demonstration that counsel provided constitutionally ineffective assistance (which allows the petitioner then to assert the underlying claim).[234]

IV. IMPORTANT ISSUES UNDER THE PCPA

A. *Whether the PCPA Authorizes a Court to Order Discovery*

There is uncertainty about whether, and the extent to which, a court may authorize parties to conduct discovery in postconviction cases. If one traces the current governing rule to its source, however, it appears that at a minimum, a court has discretion to order limited discovery, especially by deposition.

Maryland Rule 4-406 grants courts broad discretion in conducting evidentiary hearings and structuring the rules that govern them. The rule states: "Evidence may be presented by affidavit, deposition, oral testimony, or in any other form as the court finds convenient and just. In the interest of justice, the court may decline to require strict application of the rules in Title 5, except those relating to the competency of witnesses."[235]

The authorization to accept evidence "in any other form as the court finds convenient and just" is a particularly broad grant of discretion.

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233. MD. CODE ANN., CRIM. PROC. § 7-106(c) (2004).

234. Criminal defendants have a constitutional right to the effective assistance of counsel at trial, Strickland v. Washington, 466 U.S. 668, 686 (1984) ("[T]he right to counsel is the right to the effective assistance of counsel." (quoting McCann v. Richardson, 397 U.S. 759, 771 n.14 (1970))), and on appeal, Evitts v. Lucey, 469 U.S. 387, 396 (1985) ("A first appeal as of right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney."); Wilson v. State, 284 Md. 664, 671, 399 A.2d 256, 260 (1979) ("Entitlement to assistance of counsel [on appeal] would be hollow indeed unless the assistance were required to be effective."). In Maryland, postconviction petitioners have a statutory right to counsel, which includes effective assistance. Section 7-108 of the Criminal Procedure Article provides that right, and section 4(b)(3) of Article 27A of the Maryland Code incorporates that right into the Maryland Public Defender Act. "[R]egardless of the source, the right to counsel means the right to the effective assistance of counsel." State v. Flansburg, 345 Md. 694, 703, 694 A.2d 462, 467 (1997). In *Stovall v. State*, the court said: "A defendant has a broader right to counsel under the Maryland Public Defender Act than under the United States Constitution." 144 Md. App. 711, 721, 800 A.2d 31, 37 (2002). It cited *McCarter v. State*, 363 Md. 705, 713, 770 A.2d 195, 199 (2001), and *Flansburg*, 345 Md. at 700, 694 A.2d at 465.

235. MD. R. 4-406(c). Title 5 contains rules of evidence.

The initial version of the PCPA, as enacted in 1958, included the substance of the above-quoted provision.[236] That provision, in turn, came verbatim from section 7 of the UPCPA.[237]

The qualified right to conduct discovery is implied from the parties' right to *present* evidence by "deposition" and "in any other form as the court finds convenient and just."[238] The parties must be able to *create* those forms of evidence in the first instance. Without at least limited forms of discovery, the parties would not be able to do so.

It is a novel issue in Maryland whether 4-406(c) authorizes a court to order limited discovery, but appellate courts in other states have found that provisions like Rule 4-406(c) authorize postconviction courts to do so.[239]

It might be argued that Rule 4-406(c) only permits courts to *admit* depositions, but not to order that depositions be taken, and similarly, only to admit "other form[s]" of existing evidence, "as the court finds convenient and just," but not to issue orders that allow the parties to obtain and create these forms of evidence. Or, it might be contended that the rule only allows parties to take depositions to perpetuate testimony. There are serious problems with these arguments, however.

First, neither Rule 4-406, nor the commentary to it, contains any such limitations.

Moreover, the admit-but-not-take-deposition argument would render the "deposition" provision a virtual nullity.[240] It is the rare criminal case in Maryland in which a party takes a deposition.[241]

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236. Section 645G of the original Act provided: "The court may receive proof by affidavits, depositions, oral testimony, or other evidence, and may order the petitioner brought before it for the hearing." Act of April 4, 1958, ch. 44, § 645G, 1958 Md. Laws 178, 181.

237. UNIF. POST-CONVICTION PROCEDURE ACT, 11A U.L.A. 267, 268 (1995).

238. MD. R. 4-406(c).

239. *See* Gollehon v. State, 986 P.2d 395 (Mont. 1999) (applying MONT. CODE ANN. § 46-21-201(5), which authorizes admission of depositions in postconviction proceedings, and noting both a prior court order requiring discovery and that the parties took discovery depositions to comply with it); *see also* State v. Wright, 42 P.3d 753, 758 (Mont. 2001) (applying section 46-21-201(5) and reciting that the deposition had been taken and admitted into evidence and holding that strict compliance with deposition rules of civil procedure is not required in postconviction cases).

240. *See* State v. Pagano, 341 Md. 129, 134, 669 A.2d 1339, 1341 (1996) (noting that the court interprets statutes "so that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless, or nugatory"); Stanley v. State, 157 Md. App. 363, 378, 851 A.2d 612, 620 (2004) (noting that courts "should construe the statute in a manner that results in an interpretation reasonable and consonant with logic and common sense" (internal quotation marks omitted)).

241. MD. R. 4-261(b) authorizes a party in a criminal case to take a pretrial deposition only if the parties agree to do so ("subject to the right of the witness to move for a protective order") or "the court, on motion of a party, . . . order[s] that the testimony of a witness be taken by deposition if satisfied that the witness may be unable to attend a trial or hear-

Therefore, unless the postconviction judge orders that a deposition be taken, there will be no deposition to admit into evidence at the postconviction proceeding. This argument also ignores the nature of the postconviction process, which protects rights of convicted defendants based on evidence *outside* of the trial and appellate record, not within it, as a preexisting deposition would be.

Both arguments also ignore the central purpose of Rule 4-406(c), which is to allow the parties to efficiently and effectively *prepare*, as well as present, evidence and to allow the court to efficiently control the hearings that it holds.

Finally, the history of the rule supports the limited-discovery interpretation of it. The Court of Appeals adopted Rule 4-406(c) in 1984, thereby transferring the "deposition" provision from one Maryland Rule, Rule BK 44(d), to another, 4-406(c). Before the transfer, Rule 1000 made the civil discovery rules applicable to Chapter 1100 proceedings, including postconviction proceedings. The Court of Appeals in *State v. Giles*[242] explained:

> With respect to the authority of the appellees [postconviction petitioners] to take depositions in a proceeding of this nature, the lower court found that proceedings under the P.C.P.A. are civil in nature and that the rules relating to civil proceedings are applicable to them. The rules governing post conviction procedure are to be found in Rules BK40 through BK48 in Chapter 1100 titled "Special Proceedings" and not under Chapter 700 dealing with procedure in "Criminal Causes." And Rule 1000 titled "Special Proceedings-General Rules Applicable" provides that "the preceding Rules, Chapters 1, 100 to 600 inclusive and 800 are applicable to Special Proceedings dealt with in Chapter 1100, except insofar as the Rules contained in Chapter 1100 otherwise provide expressly or by necessary implication." Regardless therefore of whether the rules governing post conviction proceedings are civil in nature, there seems to be little doubt, since Rule 1000, providing that Chapter 400 (Depositions and Discovery) is applicable to Chapter 1100 (Special Proceedings), that the authorization to take deposi-

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ing, that the testimony may be material, and that the taking of the deposition is necessary to prevent a failure of justice." MD. R. 4-261(b). If the Maryland Court of Appeals had meant to limit the depositions admissible in postconviction proceedings to those taken in pretrial criminal proceedings, it most likely would have added a cross-reference to Maryland Rule 4-261 in Rule 4-406 or the commentary to it, or said something about this alleged intent. It did neither.

242. 239 Md. 458, 212 A.2d 101 (1965).

> tions in post conviction proceedings was proper, and we so hold.[243]

In *State v. Bundy*,[244] the Court of Special Appeals reiterated the then-accepted rule that "a post conviction proceeding is deemed to be civil in nature," and therefore "the rules relating to civil proceedings are applicable to post conviction proceedings."[245]

Shortly after *Bundy* was decided, an assistant attorney general proposed to the Court of Appeals Standing Committee on Rules of Practice and Procedure that the evidentiary provision be transferred to the criminal rules. When asked why the "post conviction procedure rules are being placed in the criminal title, rather than in the civil title," he offered a "housekeeping" response: "The Post Conviction Act is part of the criminal article of the Code and the applicable procedure was part of the criminal article [referring to the PCPA] until the BK Rules were adopted, at which time the procedure was deleted from the code."[246] A Committee member, Paul Niemeyer,[247] asked whether "the civil discovery rules apply" to postconviction proceedings (one option), or whether "a deposition is permitted only by leave of court" (a second option).[248] He then recommended language that would have precluded the first, but only the first, option.[249] The Rules Committee, however, rejected that proposal.[250] This is not surprising given that several members of the Committee, as well as the Reporter, either thought postconviction proceedings were, and should remain, civil proceedings; or were not sure whether they were civil or criminal.[251]

Although one could argue from this history that the transfer of the provision from the civil to the criminal rules means that the rules of civil discovery do not *generally* apply to postconviction proceedings,

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243. *Id.* at 467-68, 212 A.2d at 107.

244. 52 Md. App. 456, 450 A.2d 495 (1982).

245. *Id.* at 459 n.2, 450 A.2d at 497 n.2 (citing *Giles*, 239 Md. at 467-68, 212 A.2d at 107); *see also* Carder v. Warden, 3 Md. App. 309, 239 A.2d 143 (1968) (holding that a postconviction judge acted within his authority in limiting scope of relief to appellate review of petitioner's criminal conviction).

246. Minutes of Meeting, Maryland Court of Appeals Standing Committee on Rules of Practice and Procedure 90 (Oct. 15-16, 1982) [hereinafter Rules Committee Hearing Notes].

247. Now a judge on the United States Court of Appeals for the Fourth Circuit.

248. Rules Committee Hearing Notes, *supra* note 246, at 90.

249. He suggested amending the second sentence of Maryland Rule 1-101 to read: "Title 2," which includes the civil rules of discovery, "applies to civil matters in the circuit courts, except postconviction procedures." *Id.* at 91.

250. *See* MD. R. 1-101(b) (providing for the application of Title 2 to civil matters in the circuit courts).

251. *See* Rules Committee Hearing Notes, *supra* note 246, at 90-91.

the Rules Committee's discussions and decisions, as well as the history, text, and purpose of Rule 4-406(c), support the conclusion that the drafters intended, at a minimum, to vest postconviction courts with discretion to order limited discovery if the circumstances warrant it.

B. The Meaning of the "Interests of Justice" Reopening Standard

When, in 1995, the General Assembly reduced from two to one the number of postconviction petitions that a petitioner can file,[252] it also authorized courts to "reopen a postconviction proceeding that was previously concluded if the court determines that the action is in the interests of justice."[253] Although the General Assembly did not define "interests of justice," the Court of Special Appeals has read it broadly, as the General Assembly intended. The Court has said that

> [a]lthough the phrase "in the interests of justice," as used in [the PCPA] has not been defined, we have considered its meaning in the context of a motion for a new trial under Maryland Rule 4-331, the granting of which is also within the discretion of the circuit court . . . . [T]he grounds "for the granting of a new trial . . . [are] virtually open-ended . . . ."[254]

Speaking of a motion for new trial, the court said: "In *Isley v. State*, we commented that 'there are no limits on the substantive content of

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252. Act of April 11, 1995, ch. 110, § 645A(a)(2), 1995 Md. Laws 1473, 1482 (codified as amended at MD. CODE ANN., CRIM. PROC. § 7-103(a) (2004)).

253. *Id.* (codified as amended at CRIM. PROC. § 7-104). In *Gray v. State*, the court compared a motion to reopen with an original proceeding:

> [A] person is entitled, as a matter of right, to file one postconviction petition. The reopening of a closed postconviction proceeding, however, is at the discretion of the circuit court.
>
> Also, as a matter of right, a person filing a petition for postconviction relief is entitled to a hearing and the assistance of counsel. A request that a postconviction proceeding be reopened does not entitle a person to either. Under the statute, the circuit court determines if a hearing and the assistance of counsel "should be granted." Md. Rule 4-406(a) provides that, in the absence of a stipulation that the applicable facts and law justify the requested relief, the circuit court may not reopen a proceeding or grant relief without a hearing, but a request to reopen can be denied without a hearing.

158 Md. App. 635, 645, 857 A.2d 1176, 1181-82 (2004) (citations omitted).

254. *Gray*, 158 Md. App. at 646 n.3, 857 A.2d at 1182 n.3. The court said these grounds "includ[e] the following: 'that the verdict was contrary to the evidence; newly discovered evidence; accident and surprise; misconduct of jurors or the officer having them in charge; bias and disqualification of jurors . . . ; misconduct or error of the judge; fraud or misconduct of the prosecution.'" *Id.* The court added: "We also explained that a new trial could be granted if the evidence was legally insufficient or the verdict was 'so against the weight of the evidence as to constitute a miscarriage of justice.'" *Id.* (quoting Love v. State, 95 Md. App. 420, 427, 621 A.2d 910, 914 (1993)).

what may be urged . . . as being "in the interest of justice."'"[255] Whatever limits there should be on the scope of judicial discretion to act in the interests of justice are to be found in "the statutory constraints of the [PCPA] and the type of claims to which it affords a remedy."[256]

This broad interpretation of the "interests of justice" standard is wholly consistent with both the flexible common understanding of the word "justice" and the legislative history of the clause. It was adopted as an amendment to Senate Bill 340, which contained the one-petition-only provision.[257] The Office of Public Defender proposed the "interests of justice" amendment in lieu of the original "miscarriage of justice" standard,[258] which the Office argued was "insurmountable federal language,"[259] and the amendment became known as the "Public Defender Amendment."[260] The Governor's Commission on the Death Penalty, which issued its report in November 1993, had recommended both the one-petition limitation and the "miscarriage of justice" reopening standard.[261] The Commission explained that establishing a standard for reopening postconviction proceedings was a "difficult issue."[262] It offered as examples of its "miscarriage" stan-

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255. *Id.* (quoting Isley v. State, 129 Md. App. 611, 633, 743 A.2d 772, 784 (2000)).

256. *Id.*

257. The following was the text of the amendment and deleted language (with original statutory language in regular text, deleted language in brackets, bill provisions in capital letters, and the amendment in italicized, capital letters):

SECTION 1:

. . . .

645A

(a) (1). . . .

(2) (I) A person may [not file more than 2 petitions] FILE ONLY ONE PETITION, arising out of each trial, for relief under this subtitle.

(II) THE COURT MAY IN ITS DISCRETION REOPEN A POST CONVICTION PROCEEDING THAT WAS PREVIOUSLY CONCLUDED IF THE COURT DETERMINES THAT SUCH ACTION IS *IN THE INTERESTS* OF JUSTICE.

S.B. 340, 1995 Leg., 409th Sess. (Md. 1995).

258. Proposed Public Defender Amendments to S.B. 340, Amendment 1 (Feb. 28, 1995) (available in the legislative reference file, S.B. 340).

259. *Id.* (statement of George Lipman, now a judge in the District Court of Maryland, Baltimore City).

260. *See id.*

261. GOVERNOR'S COMM'N ON THE DEATH PENALTY, AN ANALYSIS OF CAPITAL PUNISHMENT IN MARYLAND: 1978-1993, at xxiii (1993). In its "Recommendation 17," captioned "Elimination of Second Postconviction Petition," the Commission said: "The legislature should amend section 645A of Article 27 to eliminate the right of a defendant to file a second postconviction petition. The amendment should also provide that the postconviction court may reopen a proceeding only if a reopening is necessary to avoid a miscarriage of justice." *Id.*

262. *Id.* at 258.

dard, which it took from Supreme Court decisions, "new law claims, i.e., claims based on judicial decisions subsequent to the initial postconviction proceeding," and claims that "a constitutional violation has caused the conviction of one innocent of a crime."[263]

The rejection of the "miscarriage of justice" standard and its universally accepted meaning, and adoption of the "interests of justice" standard expressed the General Assembly's clear intention that courts would consider a variety of factors, in addition to persuasive claims of innocence and newly announced legal rules, to determine whether to reopen a prior postconviction proceeding.

C. *Potential Applications of the "Interests of Justice" Standard, in Tandem with the "Special Circumstances" Exception to Waiver*

1. *Mandatory Reopenings.*—

a. When Postconviction Counsel Provides Ineffective Assistance of Counsel to the Petitioner.—The Court of Special Appeals has said: "There is no entitlement to have a closed postconviction proceeding reopened unless the petitioner asserts facts that, 'if proven to be true at a subsequent hearing[,] establish that postconviction relief would have been granted but for the ineffective assistance of . . . postconviction counsel.'"[264] Put affirmatively, there is an entitlement to reopen if a petitioner can prove both prongs of the ineffective assistance of counsel test.

First, the petitioner must prove "that [postconviction] counsel's performance was deficient."[265] To do this, the petitioner "must (1) demonstrate that counsel's acts or omissions, given the circumstances, 'fell below an objective standard of reasonableness considering pre-

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263. *Id.* at 258-59. As the Commission indicated, prior to 1995, the federal judiciary had given the "miscarriage of justice" standard a restrictive interpretation in habeas corpus cases, limiting it to claims of innocence. *See* McClesky v. Zant, 499 U.S. 467, 494-95 (1991) (applying a "miscarriage of justice" standard that required an innocent man's conviction). In fact, during the General Assembly's consideration of S.B. 340, the Supreme Court reiterated this principle in *Schlup v. Delo*, holding that a "fundamental miscarriage of justice" occurs when a constitutional violation has probably resulted in the conviction of one who is actually innocent. 513 U.S. 298, 315-17 (1995) (discussing Herrera v. Collins, 506 U.S. 390, 404 (1993)).

264. Harris v. State, 160 Md. App. 78, 97, 862 A.2d 516, 527 (2004) (emphasis added); *see* Tomlinson, *supra* note 5, at 965 (arguing, prior to *Stovall*, that the ineffectiveness of postconviction counsel is a compelling ground to reopen a postconviction proceeding).

265. Gross v. State, 371 Md. 334, 349, 809 A.2d 627, 635 (2002) (quoting Oken v. State, 343 Md. 256, 283, 681 A.2d 30, 43 (1996)).

vailing professional norms,' and (2) overcome the presumption that the challenged conduct 'be considered sound trial strategy.'"[266]

Second, the petitioner must show that that counsel's "deficient performance prejudiced the defense."[267] This means, "putting aside those few situations in which prejudice is presumed (actual or constructive denial of counsel and actual conflict of interest), the defendant must show that the particular and unreasonable errors of counsel 'actually had an adverse effect on the defense.'"[268] This requires more proof than that "the errors had some conceivable effect on the outcome of the proceedings . . . ," but less than "that counsel's deficient conduct more likely than not altered the outcome in the case."[269] The test is whether there is a "substantial possibility" that counsel's errors altered the outcome in the case.[270]

If both these tests are satisfied, the court must reopen the prior proceeding and grant appropriate relief.

b. Retroactive Applications of New Standards.—There is at least one other ground that *entitles* a petitioner to reopen. It is, pursuant to section 7-106(c) that a new, binding and retroactive standard in the petitioner's case when it would "affect the validity of the petitioner's conviction or sentence."[271] By the express terms of the provision, claims based on such new standards, "[n]otwithstanding any other provision of" the PCPA, "may not be considered to have been finally litigated or waived."[272] This is a legislatively prescribed, mandatory reopening provision.

2. Discretionary Reopenings.—In this Section, I combine discussion of the "interests of justice" and "special circumstances" standards because a petitioner must satisfy both to reopen. That is, the petitioner must demonstrate both that it is in the interests of justice to reopen (i.e., there are good reasons why she did not assert the claim in the original proceeding), and she has not waived the claim she

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266. *Id.* (citation omitted); *accord* Strickland v. Washington, 466 U.S. 668, 686 (1984); Bowers v. State, 320 Md. 416, 578 A.2d 734 (1990).

267. *Gross*, 371 Md. at 349, 809 A.2d at 635 (quoting *Oken*, 343 Md. at 283, 681 A.2d at 43).

268. *Bowers*, 320 Md. at 425, 578 A.2d at 738 (quoting *Strickland*, 466 U.S. at 693).

269. *Id.* (quoting *Strickland*, 466 U.S. at 693).

270. *Id.* at 427, 578 A.2d at 739. For applications of these tests, see, e.g., *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. State*, 326 Md. 367, 605 A.2d 103 (1992).

271. MD. CODE ANN., CRIM. PROC. § 7-106(c) (2004). This provision was part of the legislative package of revisions in 1965. *See supra* Part III.C.1.h (describing the components of the 1965 amendments to the Act).

272. CRIM. PROC. § 7-106(c)(2).

wishes to assert by failing to assert it before (i.e., there are "special circumstances" for this omission).

Because the "interests of justice" and "special circumstances" standards are fact dependent, it is difficult to generalize about case profiles that might satisfy them. Assuming proper facts, however, there are two that should be good candidates.

a. A Showing of Innocence.—Maryland law contains two provisions that allow some prisoners to assert newly discovered evidence, including of innocence, under limited circumstances.

Maryland Rule 4-331(c) allows three groups of litigants to file motions for new trials based on "newly discovered evidence."[273] To be successful, a movant must first establish that the evidence is "in fact, newly discovered evidence—evidence that could not have been discovered by due diligence in time to have presented it [earlier],"[274] and, second, demonstrate "that the newly discovered evidence 'may well have produced a different result, that is, there was a substantial or significant possibility that the verdict of the trier of fact would have been affected.'"[275]

Those who are eligible to file motions under Rule 4-331(c) are: (1) any defendant who files a motion within one year after final judgment;[276] (2) a death-sentenced prisoner who "at any time" files a motion containing new evidence that "if proven, would show that the defendant is innocent of the capital crime . . . or of an aggravating circumstance or other condition of eligibility for the death penalty" that the decisionmaker "actually found" when it "impos[ed] the death sentence";[277] and (3) any defendant who "at any time" files a motion "based on DNA identification testing or other generally accepted scientific techniques the results of which, if proven, would show that the defendant is innocent of the crime of which the defendant was convicted."[278]

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273. MD. R. 4-331(c).

274. Jackson v. State, 358 Md. 612, 626, 751 A.2d 473, 480 (2000) (quoting Yorke v. State, 315 Md. 578, 588, 556 A.2d 230, 235 (1989)). The defendant must file the motion for a new trial within ten days after a verdict. MD. R. 4-331(a).

275. *Jackson*, 358 Md. at 626, 751 A.2d at 480 (quoting *Yorke*, 315 Md. at 588, 566 A.2d at 235).

276. MD. R. 4-331(c)(1). The date of finality is "the date the [trial] court imposed sentence or the date it received a mandate issued by the Court of Appeals or Special Appeals, whichever is later." *Id.*

277. *Id.* 4-331(c)(2).

278. *Id.* 4-331(c)(3).

The 2001 DNA Evidence–Postconviction Review Act[279] provides a narrower remedy by which some prisoners can obtain DNA evidence of "wrongful conviction or sentencing"[280] and assert a claim based on that evidence.[281] It authorizes a person convicted of an enumerated crime (murder, manslaughter, rape, and sexual offense crimes),[282] to "file a petition for DNA testing of scientific *identification* evidence"[283] that the State possesses.[284] A court "shall order DNA testing" if a two-part test is satisfied: (1) there is a "reasonable probability" that the requested testing "has the scientific potential to produce *exculpatory or mitigating evidence* relevant to a claim of wrongful conviction or sentencing,"[285] and (2) the test requested "employs a method of testing generally accepted within the relevant scientific community."[286] If the test results are "unfavorable to the petitioner," the Act directs the court to dismiss the petition.[287] If they are "favorable," the court shall either "open a postconviction proceeding" if the petitioner has not before initiated one, or reopen the petitioner's prior proceeding.[288]

The Act does not give a petitioner the right to counsel.[289] Nor does it specify when a petitioner may be granted, or is entitled to, a hearing. Because this provision is new, there is not a substantial body of case law interpreting and applying it.[290]

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279. Act of May 15, 2001, ch. 418, 2001 Md. Laws 2494 (codified as amended at MD. CODE ANN., CRIM. PROC. § 8-201 (2004 Supp.)).

280. CRIM. PROC. § 8-201(c)(1).

281. *Id.* § 8-201(h)(2).

282. *Id.* § 8-201(b).

283. *Id.* (emphasis added).

284. *Id.* The Act requires the State to preserve some types of evidence for limited periods of time. *Id.* § 8-201(i), (j).

285. *Id.* § 8-201(c)(1) (emphasis added).

286. *Id.* § 8-201(c)(2).

287. *Id.* § 8-201(h)(1).

288. *Id.* § 8-201 (h)(2).

289. Trimble v. State, 157 Md. App. 73, 81, 849 A.2d 83, 87-88 (2004).

290. For applications of similar provisions in other states, see, e.g., *State v. Bronson*, 672 N.W.2d 244, 250-51 (Neb. 2003) (applying a comparable Nebraska DNA provision, and holding that "a court may properly grant a motion to vacate and set aside the judgment under [a Nebraska statute] when (1) the DNA testing results exonerate or exculpate the person and (2) the results, when considered with the evidence of the case which resulted in the underlying judgment, show a complete lack of evidence to establish an essential element of the crime charged"); *Shuttle v. State*, No. E2003-00131-CCA-R3-PC, 2004 WL 199826, at *5 (Tenn. Crim. App. 2004) (reversing a lower court's refusal, in a postconviction proceeding under the Tennessee DNA Analysis Act, to order DNA testing and finding that petitioner had established a "reasonable probability that he would not have been prosecuted or convicted if exculpatory DNA evidence had been obtained"). *See also* Saffold v. State, 850 So. 2d 574 (Fla. Dist. Ct. App. 2003) (interpreting a comparable Florida statute); State v. Kinder, 122 S.W.3d 624, 632-33 (Mo. 2003) (interpreting a comparable Missouri statute). Similar statutes exist in Colorado (COLO. REV. STAT. ANN. §§ 18-1-411 to -416

There is a group of prisoners who fall outside the combined scope of these two protections. That group includes those who, more than a year after their convictions, are able to obtain and produce compelling, nonscientific evidence that they are factually innocent. There are two ways in which such a demonstration of innocence could be relevant. It might constitute a freestanding, substantive claim, based on the federal and state constitutions, which a prisoner could assert on postconviction.[291] Or, it might be a factor that a court uses to excuse the waiver of another, separate substantive claim. Under this theory, innocence is the "gateway"[292] to the other claim, through which the court may consider and resolve that claim on the merits.[293]

Although the standards of proof may differ, Maryland's courts should adopt both the gateway and freestanding theories of innocence as Maryland law.

(1) Freestanding Innocence.—In *Herrera v. Collins*,[294] the Supreme Court considered a constitutional claim of freestanding innocence.[295] Although the Court initially appeared to reject the argument,[296] it backtracked later in the opinion:

> We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal

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(West 2004)); Delaware (DEL. CODE ANN. tit. 11 § 4504 (2001)); the District of Columbia (D.C. CODE ANN. § 22-4133 (Supp. 2004)); Idaho (IDAHO CODE § 19-4902 (Michie Supp. 2003)); Louisiana (LA. CODE CRIM. PROC. ANN. art. 926.1 (West Supp. 2005)); Maine (ME. REV. STAT. ANN. tit. 15, § 2138 (West 2003)); New Mexico (N.M. STAT. ANN. § 31-1A-2 (Michie Cum. Supp. 2003)); Utah (UTAH CODE ANN. § 78-35a-301 (Supp. 2002)); and Washington (WASH. REV. CODE ANN. § 10.73.170 (West Supp. 2005)).

291. See the excellent analysis of the constitutional support for this argument in George C. Thomas III et al., *Is It Ever Too Late for Innocence? Finality, Efficiency, and Claims of Innocence*, 64 U. PITT. L. REV. 263 (2003).

292. Herrera v. Collins, 506 U.S. 390, 404 (1993).

293. *Id.* The Court in *Herrera* said that, under this theory, "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.*

294. 506 U.S. 390 (1993).

295. Herrera grounded his claim in the Eighth Amendment's proscription of cruel and unusual punishments and the Fourteenth Amendment's guarantee of due process. *Id.* at 396-97. Chief Justice Rehnquist, writing for the majority, identified the different conceptions of due process that the majority and dissent had. *Id.* at 407 n.6. For the majority, the issue was one of procedural due process—"whether [due process] entitles petitioner to judicial review of his 'actual innocence' claim." *Id.* For the dissent, it was one of substantive due process—"whether due process prohibits the execution of an innocent person." *Id.*

296. *Id.* at 404-05.

> habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high.[297]

Courts and commentators have analyzed the various opinions in *Herrera* in an effort to "count the votes" for and against the freestanding innocence argument.[298] It is clear that, assuming there is such a right, the Justices disagreed about the appropriate standard of proof to establish innocence.[299]

State courts have greater reason than do federal courts to recognize the constitutional basis of freestanding claims of innocence, as several have recognized.

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297. *Id.* at 417. Justice O'Connor, joined by Justice Kennedy, concurring, said that "the execution of a legally and factually innocent person would be a constitutionally intolerable event," but she concluded that Herrera was not innocent. *Id.* at 419 (O'Connor, J., concurring).

298. *See, e.g., In re* Clark, 855 P.2d 729, 760 (Cal. 1993) ("A majority of the justices of the United States Supreme Court have expressed a belief that the Eighth and Fourteenth Amendments preclude execution of an innocent person," citing the *Herrera* opinions of Justice O'Connor, joined by Justice Kennedy; of Justice White; and of Justice Blackmun, joined by Justice Stevens and Justice Souter); State *ex rel.* Holmes v. Court of Appeals, 885 S.W.2d 389, 397 (Tex. Crim. App. 1994) ("From our reading of *Herrera*, we understand six members of the Supreme Court to have recognized the execution of an innocent person would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution . . . . With this sound and fundamental principle of jurisprudence we cannot disagree; such an execution would surely constitute a violation of a constitutional or fundamental right."). *But see* People v. Washington, 665 N.E.2d 1330, 1335 (Ill. 1996) (stating the *Herrera* opinions are "conflicted," but "[c]onflicted or not, at least for noncapital cases, *Herrera* clearly states . . . that a freestanding claim of innocence is not cognizable as a fourteenth amendment due process claim."); Thomas III et al., *supra* note 291, at 285:

> Though some have treated the constitutional status of a free-standing claim of innocence as settled by *Herrera*, we think *Herrera* did not go that far. The Court reached, and rejected, Herrera's claim on the merits by assuming "for the sake of argument in deciding this case" that "a truly persuasive demonstration of actual innocence . . . would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim."

Id. (footnotes omitted). The *Washington* court, however, went on to find the right of the collateral petitioner to assert freestanding innocence was protected by the state due process clause. 665 N.E.2d at 1337.

299. Chief Justice Rehnquist would have required a "truly persuasive demonstration" (and a failure of the state process), *Herrera*, 506 U.S. at 417; Justice White, that "no rational trier of fact could [find] proof of guilt beyond reasonable doubt," *id.* at 429 (White, J., concurring); and Justice Blackmun, that the petitioner show "he probably is innocent," *id.* at 442 (Blackmun, J., concurring).

In *State ex rel. Amrine v. Roper*,[300] the Missouri Supreme Court recognized a freestanding claim of innocence in a successive proceeding.[301] In a 4-3 decision, the court held that the *Herrera* decision itself envisioned a more vigorous role for state courts in cases involving innocence claims.[302] Indeed, in the view of Chief Justice Rehnquist, the federal courts have no role to play unless there is no "state avenue open to process such a claim."[303] The Missouri Supreme Court held that state habeas corpus was an "avenue" by which a capital petitioner could assert a "compelling case of actual innocence independent of any constitutional violation at trial."[304] In determining the required standard of proof of innocence, the court said it was not "required to impose as high a standard as would a federal court in reviewing a freestanding claim of actual innocence, for . . . this Court is not affected by the federalism concerns that limit the federal courts' jurisdiction to consider non-constitutional claims of actual innocence."[305] The court concluded that the standard should be "a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment."[306]

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300. 102 S.W.3d 541 (Mo. 2003).

301. Amrine was convicted of killing a fellow prisoner and sentenced to death. *Id.* at 544. Throughout and after the trial, he claimed that he was innocent. He eventually supported his innocence claim in state postconviction and federal habeas corpus proceedings with affidavits of all three prisoners who had testified against him in which they each recanted their testimony. *Id.* at 544-45; *see* Laura Denvir Stith, *Symposium on Tomorrow's Issues in State Constitutional Law: A Contrast of State and Federal Court Authority to Grant Habeas Relief*, 38 VAL. U. L. REV. 421, 424 (2004) (stating that when he lost in these proceedings, "Mr. Amrine made a final bid for habeas corpus relief directly in the Supreme Court of Missouri . . . . [H]e was actually innocent of the crime, he argued. This should at least provide a 'gateway' for consideration of his underlying constitutional claims under *Schlup v. Delo*. And, he argued, even if he could demonstrate no underlying constitutional violation, his freestanding claim of actual innocence, considered alone, should be enough to entitle him to release or a new trial where, as here, all of the inculpatory evidence from his trial had been discredited." (citing Schlup v. Delo, 513 U.S. 298 (1995)).

302. *See Amrine*, 102 S.W.3d at 546-47 (noting that the jurisdictional problems inherent in a federal court review of a state court conviction and sentence do not similarly "deprive a state court from reviewing the conviction and sentence if its own state habeas law so permitted").

303. *Herrera*, 506 U.S. at 417.

304. *Amrine*, 102 S.W.3d at 547.

305. *Id.* at 548.

306. *Id.* The court found that Amrine's proof satisfied this standard and stated that "the evidence supporting the conviction must be assessed in light of all of the evidence now available." *Id.* The court emphasized that "the evidence [at trial] was not overwhelming. There was significant evidence indicating Amrine's innocence from the beginning . . . . There was no physical evidence linking Amrine to the murder . . . [and the three witnesses against him] have now completely recanted their trial testimony." *Id.* The court reversed Amrine's conviction and ordered that the State either file new charges or release him. *Id.* at 549. "The State initially did file such charges, but a few months later dropped them and

The source of the right in *Amrine* was the Missouri death penalty statute, which contains a provision authorizing the Missouri Supreme Court to consider the "strength of the evidence" in a capital case.[307] The court added in dicta that the Missouri Constitution contains a due process clause, and that, "as the purpose of the criminal justice system is to convict the guilty and free the innocent, it is completely arbitrary to continue to incarcerate and eventually execute an individual who is actually innocent."[308]

In *People v. Washington*,[309] the Illinois Supreme Court considered a *noncapital* petitioner's freestanding claim of innocence, which he asserted in a successive postconviction proceeding, and held that the due process clause of the Illinois Constitution entitled the petitioner to assert the claim.[310] The court went beyond its reading of *Herrera*, noting "we labor under no self-imposed constraint to follow federal precedent in 'lockstep' in defining Illinois' due process protection."[311] The court held that "when newly discovered evidence indicates that a convicted person is actually innocent," both "procedural and substantive due process" require that a court provide relief.[312]

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released Mr. Amrine—nearly eighteen years after the murder of which he had once been convicted." Stith, *supra* note 301, at 433.

307. *Amrine*, 102 S.W.3d at 547 (citing State v. Cheney, 967 S.W.2d 47 (Mo. 1998)).

308. *Id.* at 547 n.3 (noting that even absent federal constitutional restraints, Article I, section 10 of the Missouri Constitution prohibits such a due process violation).

309. 665 N.E.2d 1330 (Ill. 1996).

310. *Id.* at 1337.

311. *Id.* at 1335 (citation omitted).

312. *Id.* at 1336. The court said: "In terms of procedural due process, we believe that to ignore such a claim would be fundamentally unfair . . . Imprisonment of the innocent would also be so conscience shocking as to trigger operation of substantive due process." *Id.* The court challenged the rigid "legal construct" that a person who has been convicted in a constitutionally adequate trial must be considered guilty regardless of the countervailing evidence. *Id.* "The stronger the [innocence] claim—the more likely it is that a convicted person is actually innocent—the weaker is the legal construct dictating that the person be viewed as guilty." *Id.* It follows that "[a] 'truly persuasive demonstration of innocence' would effectively reduce the idea to legal fiction." *Id.* In sum, the court said: "We believe that no person convicted of a crime should be deprived of life or liberty given compelling evidence of actual innocence." *Id.* The test is whether the evidence is "new, material, noncumulative and, most importantly, 'of such conclusive character' as would 'probably change the result on retrial.'" *Id.* at 1337. Other state courts have recognized freestanding innocence as a collateral claim as well. *See* Miller v. Comm'r of Corr., 700 A.2d 1108 (Conn. 1997) (explaining that a petitioner must establish that he is actually innocent even though he received a fair trial); Summerville v. Warden, 641 A.2d 1356, 1369 (Conn. 1994) (holding that "a substantial claim of actual innocence is cognizable by way of a petition for a writ of habeas corpus, even in the absence of proof by the petitioner of an antecedent constitutional violation that affected the result of his criminal trial"); *Ex parte* Elizondo, 947 S.W.2d 202 (Tex. Crim. App. 1996) (holding that claims of actual innocence are recognized in postconviction habeas corpus proceedings). *But see* State v. Byrd, 762 N.E.2d 1043, 1053 (Ohio Ct. App. 2001) (explaining that Ohio appellate courts have

Distinguishing its prior decisions, the court said that although it had in the past "perfunctorily evaluated new evidence claims in cases brought under the Post-Conviction Hearing Act," it had never "expressly identified the constitutional right implicated in a freestanding claim of innocence based upon new evidence."[313]

Judge Laura Denvir Stith, who sits on the Supreme Court of Missouri, describes the significance of decisions like these:

> These cases recognize that the authority of state courts to recognize freestanding claims of actual innocence is not derivative of the recognition of such claims in federal courts. Federal courts must be concerned with issues of comity and deference to state courts and state policies . . . . [B]eginning with *Wainwright v. Sykes,* the United States Supreme Court has narrowed the basis of federal habeas review and made federalism an increasingly dominant factor in its decision making. In *Herrera* and *Schlup,* it made clear that, in the absence of an underlying constitutional violation, it would hold that principles of comity and deference preclude a federal court from interfering with the judgment in a constitutionally adequate trial.
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> . . . .
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> But, state courts can and, as is evident, often do provide a remedy for such injustices under their state law, pursuant to their authority under their state constitutions to grant writs of habeas corpus in cases of actual innocence.[314]

Maryland's courts could find that a noncapital collateral petitioner has a constitutional right to assert a freestanding innocence claim, under either the federal constitution,[315] or under Maryland's Declaration of Rights, especially the "Law of the land" provision in

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held freestanding innocence claims alone do not provide substantive grounds for postconviction relief and should instead be raised as part of a motion for a new trial).

313. *Washington,* 665 N.E.2d at 1335.

314. Stith, *supra* note 301, at 436-37. Judge Stith also quoted Arleen Anderson:

> The states must recognize that since *Herrera,* they shoulder most of the responsibility for providing review of post-conviction claims of actual innocence, especially in non-capital cases. This is particularly true since the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which, for example, denies a federal habeas court jurisdiction in a capital case if the petitioner fails to raise his claim in state court, even if the claim depends on an assertion of actual innocence.

Arleen Anderson, *Responding to the Challenge of Actual Innocence Claims After* Herrera v. Collins, 71 TEMP. L. REV. 489, 498 (1998).

315. *See* Thomas III et al., *supra* note 291, at 264 (arguing that the Due Process Clauses of the Fifth and Fourteenth Amendments require courts to hear freestanding innocence claims).

Article 24.[316] In either event, the claim would be actionable under section 7-102(a)(1) of the PCPA.[317]

Although the freestanding innocence argument is strongest when the petitioner is under a sentence of death, it logically also applies to prisoners who are serving noncapital sentences. "Imprisonment of the innocent" is "conscience shocking" and intolerable as well.[318]

If a petitioner can satisfy the demanding burden of proving freestanding innocence—although the issue has not been uniformly resolved, several state decisions support a standard requiring clear and convincing evidence of innocence[319]—the exceptions to waiver, especially the "special circumstances" provision,[320] ought to be liberally applied, as should the "interests of justice" reopening provision.[321] It would make little sense to recognize the principle, and then hold that a demonstrably innocent person must remain in prison, perhaps for life, because he failed to establish his innocence with due diligence.

(2) Gateway Innocence.—There is a counterintuitive quality to the Supreme Court's clear recognition of gateway, but not freestanding, innocence. Under the gateway doctrine, "[f]reeing the innocent, a primary if not sole goal of the criminal justice system, plays the role of a mere auxiliary doctrine whose only significance is to ease the way for constitutional claims less weighty than itself."[322]

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316. MD. DECL. OF RTS. art. 24 provides: "Due process. That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." Maryland's courts have held that exculpatory evidence "does not ordinarily provide grounds for postconviction relief." Gray v. State, 158 Md. App. 635, 647, 857 A.2d 1176, 1183 (2004). Rather, "[t]he usual approach for dealing with newly discovered evidence is set forth in Md. Rule 4-331." *Id.* In this line of cases, however, the courts have not considered and resolved the claims based on *Herrera* and *Schlup*, or the constitutional arguments Professor Gordon G. Young and his co-authors make in Thomas III et al., *supra* note 291.

317. MD. CODE ANN., CRIM. PROC. § 7-102(a)(1) (2004) (providing that a convicted person may challenge his conviction if it was obtained in violation of the federal or state constitution or state law).

318. People v. Washington, 665 N.E.2d 1330, 1336 (Ill. 1996).

319. *See, e.g.*, Miller v. Comm'r of Corr., 700 A.2d 1108, 1130-31 (Conn. 1997) (explaining that to establish a freestanding claim of innocence, the petitioner: (1) "must persuade the habeas court by clear and convincing evidence . . . that the petitioner is actually innocent of the crime of which he stands convicted," and (2) "must establish that, after considering all of that evidence and the inferences drawn therefrom, . . . no reasonable fact finder would find the petitioner guilty"); *Ex parte* Elizondo, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996) (a life-sentenced "petitioner must show *by clear and convincing evidence* that no reasonable juror would have convicted him in light of the new evidence").

320. *See supra* Part III.C.1.h(2).

321. *See supra* Part IV.B.

322. Thomas III et al., *supra* note 291, at 284.

In Maryland, the gateway doctrine should be based on the text and legislative history of the "interests of justice" and "special circumstances" provisions of the PCPA.[323] In *Herrera*, the Supreme Court said that a federal court's power to accept a gateway innocence claim, and thereby to excuse a prior procedural default, "is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons."[324] Maryland's courts are vested with similar equitable discretion by the "interests of justice" and "special circumstances" provisions.

Moreover, there is compelling evidence that the General Assembly intended to make gateway innocence, at least, a ground to reopen a postconviction proceeding. Recall that the initial "reopening" standard that the General Assembly considered in 1995 was the "miscarriage of justice" standard.[325] It rejected that standard because it was *too restrictive*.[326] But, according to its proponent, the Governor's Commission on the Death Penalty, even that standard would have authorized a court to reopen a postconviction proceeding when a petitioner demonstrated, as outlined by the Supreme Court that "a constitutional violation has caused the conviction of one innocent of a crime."[327] In adopting the more generous "interests of justice" standard, the General Assembly indicated its intention to include, at a minimum, innocence as a ground to reopen.[328]

The Supreme Court formulated and applied the innocence-based "miscarriage of justice" standard in *Herrera*[329] and *Schlup*.[330] In *Her-*

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323. MD. CODE ANN., CRIM. PROC. §§ 7-104, 7-106(b)(1)(ii) (2004).

324. Herrera v. Collins, 506 U.S. 390, 404 (1993).

325. *See supra* notes 257-263 and accompanying text.

326. *See* Act of April 11, 1995, ch. 110, § 645(a)(2), 1995 Md. Laws 1473, 1482.

327. GOVERNOR'S COMM'N ON THE DEATH PENALTY, *supra* note 261, at 258-59 (recommending the "miscarriage of justice" standard).

328. The legislative concern about the conviction and incarceration of the innocent is manifest in other ways. *See, e.g.*, CRIM. PROC. § 8-201 (authorizing a court under certain circumstances to order DNA testing upon a "reasonable probability" that the test has "the scientific potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing").

329. Herrera produced evidence of his innocence ten years after his trial and after he had exhausted his state appellate and postconviction, and federal habeas, remedies. *Herrera*, 506 U.S. at 393. He asserted his innocence in a successive habeas petition. In rejecting Herrera's claim, Chief Justice Rehnquist emphasized the limited role of a federal court in reviewing a state trial court's finding of guilt beyond a reasonable doubt. *Id.* at 400. The refusal of federal courts to consider freestanding claims of innocence "is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact." *Id.* He concluded that "[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence." *Id.* at 401.

rera, the Court said a federal habeas petitioner "otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence."[331] If accepted, it allows the petitioner to assert the "independent constitutional claim challenging his conviction or sentence."[332]

Rather than asserting his innocence as a substantive constitutional claim, as Herrera had, Schlup asserted his innocence as a procedural matter, to excuse defaults of two independent constitutional claims.[333] The Court held that Schlup did not have to satisfy the demanding *Herrera* standard of proof of actual innocence. In *Herrera*, the Court explained that "petitioner's claim was evaluated on the assumption that the trial that resulted in his conviction had been error free."[334] In such cases, "it is appropriate to apply an 'extraordinarily high' standard of review."[335] In contrast, Schlup claimed that he was denied a constitutionally fair trial.[336] "For that reason," held the Court, "Schlup's conviction may not be entitled to the same degree of respect as one, such as Herrera's, that is the product of an error-free trial."[337]

The standard of proof of actual innocence that is required to satisfy the "gateway" test is "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error."[338] The court equated this with probable innocence, which means "it is more likely than not that 'no reasonable juror' would have convicted him" in the light of the new evidence.[339]

These same considerations support interpreting the "interests of justice" and "special circumstances" provisions of the PCPA[340] to rec-

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330. Schlup v. Delo, 513 U.S. 298 (1995).

331. *Herrera*, 506 U.S. at 404.

332. *Id.*

333. Schlup claimed that because his counsel was ineffective and the prosecution withheld evidence, he was denied a fair trial. *Schlup*, 513 U.S. at 313-14.

334. *Id.* at 315.

335. *Id.* at 315-16.

336. *Id.* at 316.

337. *Id.*

338. *Id.*

339. *Id.* at 329.

340. MD. CODE ANN., CRIM. PROC. §§ 7-104, 7-106(b)(1)(ii) (2004). In *Herrera*, the Court said that a federal court's power to accept a gateway innocence claim, and thereby excuse a prior procedural default, "is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." Herrera v. Collins, 506 U.S. 390, 404 (1993). Similarly, the "interests of

ognize a gateway theory of innocence, and thereby to allow petitioners who meet this test to reopen prior postconviction proceedings and assert once-waived claims.[341] This is what the Circuit Court for Baltimore City did in the case of Michael Austin.[342]

Michael Austin was convicted of murder in 1975 and sentenced to life imprisonment.[343] During the robbery of a food store, one of two robbers shot and killed a security guard. A store employee and four other eyewitnesses said the shooter was "a light skinned" African American man, "5' 8" to 5' 10" tall, 150 to 160 pounds."[344] Austin is 6' 5" tall and weighed 200 pounds at the time of the crime. Inexplicably, the employee identified Austin as the shooter, both prior to trial (from a photo array and in a line-up), and at trial.[345] Austin was convicted based on the store employee's identification.

In fact, Austin was not involved in the robbery, but instead was at work at the time, which his employer's work records confirmed. However, Austin's lawyer failed to subpoena the originals of these records for trial. Austin obtained a copy, but it was a bad ("unintelligible") copy that was excluded at trial.[346]

During the years that followed, Austin, who maintained his innocence, unsuccessfully challenged his conviction on direct appeal, through motions for a new trial, in three postconviction proceedings, in a belated appeal (the relief in the second postconviction proceeding), and in appeals of the postconviction proceedings.[347]

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justice" and "special circumstances" provisions grant broad equitable discretion to postconviction courts.

341. Courts in other states have adopted the gateway innocence theory. *See, e.g.*, Clay v. Dormire, 37 S.W.3d 214, 217 (Mo. 2000) (noting the applicable standard that actual innocence is "a gateway through which the habeas petitioner must pass to have his otherwise barred constitutional claims considered"); State v. Pope, 80 P.3d 1232 (Mont. 2003) (explaining that the standard after *Schlup* was whether a reasonable juror would convict based on the new evidence); *Ex parte* Franklin, 72 S.W.3d 671, 675-76 (Tex. Crim. App. 2002) (differentiating between *Herrera*- and *Schlup*-type cases).

342. Larry A. Nathans (chief counsel) and Booth Ripke represented Mr. Austin in this proceeding.

343. Austin v. State, No. 17401280-82, slip op. at 2 (Md. Cir. Ct. Dec. 27, 2001). Austin also received a consecutive fifteen-year sentence for a handgun violation and a concurrent ten-year sentence for grand larceny. *Id.* at 2-3.

344. *Id.* at 11.

345. *Id.* at 33. This employee also identified from photographs the other alleged robber, but when he saw that defendant in person at that defendant's separate trial, the employee said he was not the robber, and the State dismissed the charges against him. *Id.* at 35.

346. *Id.* at 56.

347. *Id.* at 1.

In 2001, Austin moved to reopen his postconviction proceedings based on new evidence of his innocence.[348] After a hearing, the Circuit Court for Baltimore City, Judge John Carroll Byrnes presiding, found that the credibility of the State's sole eyewitness, the store employee, had been "severely compromised, if not destroyed"[349] by the new evidence (which showed the employee was a drug abuser and criminal, rather than an industrious college student, as depicted at trial).[350] The evidence also established that a coworker in the store, who "stood within inches of the shooter,"[351] had said he was certain that Austin was absolutely not the shooter,[352] and destroyed a damaging, alleged link between Austin and the alleged co-robber (the store employee subsequently testified at the alleged co-robber's trial that that defendant was not the co-robber, making the alleged link irrelevant).[353]

The court decided to reopen the case. It construed the "interests of justice" standard and gateway innocence exception *in pari materia.* It found that Austin's demonstration of innocence under the *Schlup* test—"it is more likely than not that 'no reasonable juror' would have convicted him"[354] given the new evidence—satisfied the "interests of justice" test, removing the "finally decided" and "waiver" bars and allowing the court to reconsider issues that Austin previously had litigated or failed to raise.[355] The court found that the showing of innocence was an independent ground for excusing waiver. It also could have found that a "special circumstance" excused waiver.[356]

The court reversed Austin's conviction on three grounds: (1) his trial lawyer was constitutionally ineffective;[357] (2) the prosecutor made an improper and prejudicial closing argument;[358] and (3) the jury had been improperly instructed that it was the judge of the law as well as of the facts.[359] The court, however, rejected Austin's freestanding innocence claim, finding that although Austin had satisfied the lower

348. Much of this evidence was developed by an "innocence project" called Centurion Ministries; other evidence was obtained from police files after Austin's second postconviction proceeding. *Id.* at 31 n.41.

349. *Id.* at 57.

350. *Id.* at 48-49.

351. *Id.* at 58.

352. *Id.* at 56-57.

353. *Id.* at 49-51.

354. Schlup v. Delo, 513 U.S. 298, 329 (1995).

355. *Austin,* slip op. at 62-64, 78-80, 82-83.

356. *See supra* Part III.C.1.h(2).

357. *Austin,* slip op. at 86.

358. *Id.* at 77-82.

359. *Id.* at 59-64.

gateway standard based on *Schlup*, he had not satisfied the higher free-standing standard based on *Herrera*.[360]

Following the decision, the State's Attorney's Office dismissed the charges against Austin; Governor Robert Ehrlich gave Austin a "full and unconditional pardon"; and the Maryland Board of Public Works awarded him $1,405,000 for his over twenty-six years of wrongful incarceration.[361]

This case demonstrates the critical importance of incorporating the gateway innocence test into Maryland's postconviction law.

b. Reasonably Unforeseeable Developments in the Law.—To date, Maryland's appellate courts have made little use of two exceptions to waiver: (1) the "special circumstances" provision in section 7-106(b)(1)(ii),[362] and (2) the "new standard" provision in section 7-106(c).[363] The use in the latter provision of the word "standard" rather than "rule," and the history of that provision (part of a package of reforms aimed at *reducing* procedural defaults),[364] strongly suggest that it should be used more frequently to forgive defaults like the one

360. *Id.* at 86-92; *see also supra* Part IV.C.2.a(1).

361. Release of Claims executed by Michael Austin on November 11, 2004 (on file with author).

362. *See supra* Part III.C.1.h(2); Washington v. Warden, 243 Md. 316, 322, 220 A.2d 607, 610 (1966) (holding that petitioner's mental illness was a "special circumstance" that excused his failure to assert a claim in earlier postconviction proceedings). The "special circumstances" provision may have been an inadvertent casualty of the Court of Appeals's decision in *Curtis v. State*, when the court held that the provision applied *directly* only to claims based on fundamental rights. 284 Md. 132, 395 A.2d 464 (1978); *see supra* Part III.C.1.h(1). This made the provision largely irrelevant since it is the rare case in which a defendant who makes an express, on-the-record, informed waiver of a claim will be able to demonstrate good reasons—i.e., "special circumstances"—that will excuse that waiver. In recent years, however, Maryland's appellate courts have rediscovered the special circumstances provision, and applied it *indirectly* in postconviction cases to the waivers of nonfundamental rights. The courts have done so by initially looking outside the PCPA to "case law or any pertinent statutes or rules," but then finding that the PCPA special circumstances provision is a "pertinent statute," and thereby returning to that provision indirectly. *Curtis*, 284 Md. at 149-51, 395 A.2d at 468; *see supra* Part III.C.1.h(2).

363. *See supra* Part IV.C.1.b. There are a few decisions in which Maryland's appellate courts have, or appear to have, applied this provision. *See, e.g.*, State v. Dowdell, 73 Md. App. 172, 533 A.2d 695 (1987) (applying retroactively in postconviction proceedings the ineffective assistance of counsel standards announced by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984)); DeLawder v. Warden, 23 Md. App. 435, 328 A.2d 76 (1974) (remanding the case to a hearing judge to determine whether, pursuant to the PCPA new-standards provision and the Supreme Court's decision in *Davis v. Alaska*, 415 U.S. 308 (1974), which held that the right of confrontation mandates that the defendant be allowed to show possible bias of a prosecution witness by cross-examining the witness on his probationary status as a juvenile delinquent, was applicable and if it should be retroactively applied).

364. *See supra* Part III.C.1.h.

I am about to describe. I believe the following hypothetical, which is based on a recurrent scenario, should satisfy the "new standard" provision. My focus in this discussion, however, is on the "special circumstances" exception.

In the case profile that I have in mind, there is an appellate decision that applies an established but broadly stated legal principle in a new specific way that defense lawyers and lower courts reasonably could not have anticipated. The appellate court, pointing to the legal principle, concludes that its decision, or that of another court, does not constitute a new standard within the meaning of section 7-106(c). However, only a handful of prescient defense lawyers have protected their clients by preserving the error in their cases. The majority of lawyers acted competently. Their omissions were not tactical, or even conscious. They, like the great majority of trial judges, simply did not anticipate, and could not have reasonably anticipated, the decision.

If the new decision comes down after a prisoner has completed the direct appellate process, and the prisoner did not raise the issue at trial or on appeal, the prisoner would have to show special circumstances to raise the issue on postconviction. If the prisoner has completed the postconviction process, the prisoner would have to demonstrate both that it is "in the interests of justice"[365] to reopen, and special circumstances exist to excuse the waiver. However, given that the "special circumstances" test probably is the stricter of the two, the central issue in my hypothetical case is the same: do special circumstances excuse waiver?

I believe they should under the circumstances I describe. The "lottery" quality of our criminal justice system is most apparent in these cases. Prisoners who had the handful of prescient lawyers get new trials; the many more who did not remain incarcerated, some for life. In many of these cases, the interests of the petitioner in a fair trial and equal treatment should outweigh the efficiency and finality interests of the state.

As noted earlier, Maryland's Court of Appeals has said that "special circumstances" may exist when defense counsel fails to preserve error because of a "misconception by a large segment of the bench and the bar" about the governing law.[366] In *Reed v. Ross*,[367] the Supreme Court summarized the arguments for excusing waiver under these circumstances. The Court said that "where a constitutional

365. MD. R. 4-406(c).
366. Walker v. State, 343 Md. 629, 648, 684 A.2d 429, 438 (1996); *see supra* Part III.C.1.h.
367. 468 U.S. 1 (1984).

claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures."[368] In these circumstances, the "procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests."[369] It is not a product of "strategic motives of any sort."[370] In addition, it is unlikely, either that the trial court, on its own, considered the argument or would have accepted it if defense counsel had made it. The Supreme Court explained:

> Just as it is reasonable to assume that a competent lawyer will fail to perceive the possibility of raising such a claim, it is also reasonable to assume that a court will similarly fail to appreciate the claim. It is in the nature of our legal system that legal concepts, including constitutional concepts, develop slowly, finding partial acceptance in some courts while meeting rejection in others. Despite the fact that a constitutional concept may ultimately enjoy general acceptance, . . . when the concept is in its embryonic stage, it will, by hypothesis, be rejected by most courts.[371]

It follows that "requiring a defendant to raise a truly novel issue is not likely to serve any functional purpose."[372] Indeed, such a requirement would be disruptive. "If novelty were never cause [for a procedural default], counsel on appeal would be obliged to raise and argue every conceivable constitutional claim, no matter how far fetched, in order to preserve a right for post-conviction relief upon some future, unforeseen development in the law."[373] Trial lawyers would have to do the same. This would encourage trial and appellate lawyers to make "meritless and frivolous" contentions, rather than those "legitimately regarded as debatable."[374]

Therefore, basing waiver on counsel's failure to make reasonably unforeseeable arguments "would not promote either the fairness or the efficiency of the state criminal justice system."[375] Admittedly, applying Maryland's "special circumstances" exception in this way would have a "finality interest" cost. But, the finality interest is not the only

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368. *Id.* at 16.
369. *Id.* at 14.
370. *Id.* at 15.
371. *Id.*
372. *Id.*
373. *Id.* at 16 (quoting Reed v. Ross, 704 F.2d 705, 708 (4th Cir. 1984)).
374. *Id.* (quoting *Reed*, 704 F.2d at 708).
375. *Id.* at 15.

one in these cases, and in these circumstances, the countervailing interests should outweigh it.

There should be limits, of course. The petitioner should be required to prove that counsel's failure to assert the error was inadvertent, not tactical, and was based on a shared misunderstanding about the applicable law. It also might be appropriate to require that the error the petitioner seeks to assert, based on the new interpretation, satisfy a "prejudice" test that reflects serious concern about the reliability of the outcome of the petitioner's trial or sentencing proceeding.[376] Using, by analogy, the second prong of the *Strickland* test for ineffective assistance of counsel, or the similar second prong of the test for motions for a new trial, a petitioner would have to show there was a "substantial possibility" that the error changed the outcome in the case.[377] Assuming such proof, Maryland's courts should recognize these circumstances both as an exception to the waiver rule and an application of the "interests of justice" reopening standard.

What follows is an example of circumstances that I believe should qualify under the reasonably unforeseeable exception to waiver, based on a "misconception by a large segment of the bench and the bar" about the governing legal rule.[378]

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376. As part of my hypothetical, the new interpretation does not satisfy the "new standard" test of section 7-106(c). If it did, the petitioner would have to show only that the new standard would "affect the validity of the petitioner's conviction or sentence."

377. Bowers v. State, 320 Md. 416, 427, 578 A.2d 734, 739 (1990) (ineffective assistance of counsel); Jackson v. State, 358 Md. 612, 626, 751 A.2d 473, 480 (2000) (motion for new trial).

378. Walker v. State, 343 Md. 629, 648, 684 A.2d 429, 438 (1996). The *Walker* court explained why the court in *Franklin v. State*, 319 Md. 116, 120, 571 A.2d 1208, 1210 (1990), had invoked the "plain error" rule on direct appeal to excuse a waiver. *Franklin* involved an erroneous intent instruction that was delivered at a time when the trial court "did not have the benefit" of the Court of Appeals's later clarification that a charge of assault with intent to kill requires proof of a specific intent to kill (rather than proof of an intent to inflict serious injury). *Id.* at 126, 571 A.2d at 1213. The *Walker* court explained that, because Franklin's defense was based on his intent, and the jury's instructions were not given in accordance with the Court of Appeals's subsequent clarification of the intent requirement, the court could apply "plain error." *Walker*, 343 Md. at 649, 684 A.2d at 438; *accord* Parker v. State, 4 Md. App. 62, 67, 241 A.2d 185, 188 (1968) (appellant's failure to object to an erroneous instruction was neither "a bad guess [n]or a trial tactic but resulted rather from a misunderstanding of the applicable law—a misunderstanding also shared by the court, and by the State," therefore the waiver should be excused). *But see* Hunt v. State, 345 Md. 122, 691 A.2d 1255 (1997) (finding that there was no change in the law that excused the failure of counsel to preserve a legal argument, and counsel for Hunt had an opportunity to bring to the court's attention the decision allegedly recognizing the new rule); Oken v. State, 343 Md. 256, 271, 681 A.2d 30, 37 (1996) (finding that the law was clearly established at the time that counsel failed to object to the sufficiency of the jury voir dire, and counsel deliberately failed to raise the matter on appeal as a tactical matter). The case example that I use is based on an unreported opinion of the Maryland Court of

For many years, most of Maryland's judges and lawyers believed that courts were required to instruct juries in criminal cases that the juries were judges of the law as well as of the facts, and that the court's instructions on the law were merely advisory. The mandate to give this instruction derived from a provision of the Maryland Constitution stating: "In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact."[379] This provision reflected Revolution-era distrust of judges, especially those loyal to the Crown.[380]

In *Stevenson v. State*,[381] the Court of Appeals held, for the first time, that courts could not generally instruct juries that they were judges of the law, despite the seemingly clear contrary requirement in the state constitutional provision. To do so would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[382] There had been minor judicially imposed limits on the advisory-law provision before,[383] but this was a dramatically different interpretation of it. The court saved the state advisory-law provision by judicially rewriting it. The court found that this provision did not "facially deprive[ ] a defendant of the federally secured right to due

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Special Appeals in *Arey v. State*, 153 Md. App. 716 (2003), *cert. denied*, 380 Md. 231, 844 A.2d 427 (2004). I was co-counsel for Mr. Arey.

379. Md. Dec. of Rts. art. 23.

380. In *Slansky v. State*, the court said:

> In England the question whether the jury should have the right to decide the law in criminal cases was for centuries the subject of controversy. But at the time of American independence the prevailing rule of the common law in England was that the court should judge the law, and the jury should apply the law to the facts. This doctrine was condemned by some of the Colonial statesmen, notably John Adams, who believed that the juries should be entitled to disregard the arbitrary and unjust rulings of the judges holding office by authority of the Crown.
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> . . . The colonists had had experience of the close connection of criminal law with politics. . . . [T]heir constant fear of political oppression through the criminal law led them and the generation following . . . to give excessive power to juries and to limit or even cut off the power of the trial judge to control the trial and hold the jury to its province.

192 Md. 94, 101-02, 63 A.2d 599, 601-02 (1949).

381. 289 Md. 167, 423 A.2d 558 (1980).

382. As the court explained more fully a year later, due process incorporates "certain bedrock" rights "which are indispensable to the integrity of every criminal trial," including that "(1) The accused is presumed innocent until proved guilty by the State by evidence beyond a reasonable doubt," and that "The State has the burden to produce evidence of each element of the crime establishing the defendant's guilt." Montgomery v. State, 292 Md. 84, 91, 437 A.2d 654, 658 (1981).

383. In *Stevenson*, the court cited to past decisions in which it had held under the advisory-law provision that juries could not determine a court's jurisdiction or resolve questions of admissibility of evidence and competency of witnesses, and that it did not have unlimited discretion to arbitrarily create new laws and disregard established ones. 289 Md. at 178-79, 423 A.2d at 564-65.

process of law"[384] because it did not authorize juries "to decide all matters that may be correctly included under the generic label 'law.'"[385] Instead, the court said, the jury's law-deciding right is limited "'to resolv[ing] conflicting interpretations of the law [of the crime] and to decid[ing] whether th[at] law should be applied in dubious factual situations', and nothing more."[386]

Although the Court of Appeals denied that its *Stevenson* decision established a new rule,[387] it certainly established a new constitutionally compelled interpretation of the advisory-law provision. The Court of Special Appeals has emphasized this on several occasions. In *Petric v. State*,[388] for example, the court said: "Ere *Stevenson*, it was generally thought by bench and bar alike that jurors in criminal cases were judges of the law and fact."[389] But, the court said, "*Stevenson* made clear that such was not the situation, but that a jury's judicial role was limited to the 'law of the crime.' Other legal issues were for the judge to determine."[390] In *Allnutt v. State*,[391] the court had previously noted that "[u]ntil *Stevenson* . . . , it was generally believed by bench and bar that a judge's comments as to the law in a criminal case were advisory and not binding on the jury."[392] But, "*Stevenson* told us that a jury's judicial role was limited to the 'law of the crime' and 'that all other legal issues are for the judges alone to decide.'"[393] The court added: "Confusion then arose as to what was meant by the term 'law of the crime.'"[394] The answer, the court said, came "[o]ne year later [when] the Court in *Montgomery v. State* sought to still the roiling waters by explicating *Stevenson*."[395] The "message of *Montgomery*," the court said, "is that Article 23 . . . [is] 'limited to those instances when the jury is the final arbiter of the law of the crime'; that is to say where there is a dispute as to the state of the law."[396]

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384. *Id.* at 169, 423 A.2d at 559.

385. *Id.* at 178, 423 A.2d at 564.

386. *Id.* at 179, 423 A.2d at 564 (quoting Dillon v. State, 277 Md. 571, 581, 357 A.2d 360, 367 (1976)).

387. *Id.* at 189, 423 A.2d at 570.

388. 66 Md. App. 470, 504 A.2d 1168 (1986).

389. *Id.* at 478, 504 A.2d at 1172.

390. *Id.* (citations omitted).

391. 59 Md. App. 694, 478 A.2d 321 (1984).

392. *Id.* at 701, 478 A.2d at 324.

393. *Id.* at 702, 478 A.2d at 325.

394. *Id.*

395. *Id.*

396. *Id.* (quoting Montgomery v. State, 292 Md. 84, 89, 437 A.2d 654, 657 (1981)).

In *Jenkins v. Hutchinson*,[397] the Fourth Circuit held that the standard Maryland advisory-law instruction given before *Stevenson* denied Jenkins his due process right to a mandatory "reasonable doubt" instruction.[398] The question, the court said, is not a refined one about the nuances of a proper reasonable doubt instruction. "The issue here, in contrast, is whether the jury was effectively given any reasonable doubt instruction at all."[399] The unacceptable constitutional risk, the court said, is that "the jury understood the advisory nature of the instructions as permitting it to ignore the reasonable doubt instruction," therefore licensing it to "fashion any standard of proof that it liked."[400]

The Fourth Circuit concluded that, at least, "there is a reasonable likelihood" that the jury applied the challenged instruction in an unconstitutional manner.[401] The court acknowledged that the flawed instruction was required by state law, but found this "irrelevant to the due process claim," as even if the instruction were "proper as a matter of state law," it "violates the Due Process Clause of the federal Constitution."[402] It cited *In re Winship*[403] in support of its decision.[404]

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397. 221 F.3d 679 (4th Cir. 2000).

398. *Id.* at 685.

399. *Id.* at 684.

400. *Id.*

401. *Id.* at 685.

402. *Id.* at 685 n.11. The injury flowing from the advisory-law instruction is "structural" in an even greater sense than when the Supreme Court used that term in *Sullivan v. Louisiana*, 508 U.S. 275 (1993). In *Sullivan*, a unanimous Court held that a defective reasonable doubt instruction denied Sullivan his right to a fair trial in violation of the Sixth and Fourteenth Amendments. In holding that the harmless error doctrine was inapplicable to the flawed instruction, the *Sullivan* Court ranked the right to a proper reasonable doubt instruction with the right to counsel, right to an unbiased judge, and right to self-representation. The Court said:

> The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

Id. at 279. Without a proper reasonable doubt instruction, "there has been no jury verdict within the meaning of the Sixth Amendment." *Id.* at 280. The Court said that this is "structural" error, quoting from *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991), and that the absence of a proper reasonable doubt instruction undermines the "jury guarantee," which is a "'basic protection' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." *Sullivan*, 508 U.S. at 281 (quoting Rose v. Clark, 478 U.S. 570, 577 (1986)).

403. 397 U.S. 358 (1970).

404. *Jenkins*, 221 F.3d at 683. Based on *In re Winship*, the Fourth Circuit found that its decision in *Jenkins* did not create a "new rule" within the meaning of *Teague v. Lane*, 489 U.S. 288, 299 (1989). Assuming that is correct, which I believe it is, it does not mean that

In 1970, in *In re Winship*, the Supreme Court held that (1) the Constitution requires a state, in the adjudicatory stage of a delinquency proceeding, to prove its case beyond a reasonable doubt, and (2) in the process, recognized the constitutional basis of the reasonable doubt standard.[405] The decision was noteworthy because of the first point, not the second. The reasonable doubt standard had been part of Maryland's criminal law for years,[406] and it had coexisted with the advisory-law provision of the state constitution for years. During the nine years between *In re Winship* and *Stevenson*, neither the Rules Committee,[407] nor Maryland's appellate courts,[408] nor its lower bench or bar,[409] contended that the general statement of constitutional principle in *In re Winship* threatened the continued viability of the advisory-law provision.

In sum, this is one example, I believe, of a set of circumstances that should satisfy the "special circumstances" and "interests of justice" standards for forgiving waiver and reopening a postconviction proceeding.[410] Admittedly, this would have an impact on a number of older convictions, especially of life-sentenced prisoners who had jury trials. I do not underestimate the "finality" costs of my argument. They are very substantial. However, it also might be possible, by examining the records on a case-by-case basis, to evaluate the extent to

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the Maryland bench and bar should reasonably have anticipated *Stevenson* and *Montgomery*, based on *In re Winship*. Put another way, whether the reasonable unforeseeability of a subsequent decision should comprise a "special circumstance" excusing waiver under the PCPA is a substantially different issue than whether a federal habeas decision would establish a "new rule" under *Teague* and the AEDPA.

405. 397 U.S. 358.

406. *E.g.*, *In re* Spalding, 273 Md. 690, 332 A.2d 246 (1975); Lindsay v. State, 8 Md. 100, 258 A.2d 760 (1969); Jenkins v. State, 238 Md. 451, 209 A.2d 616 (1965).

407. In 1975, Maryland Rule 756(b) required a trial court to instruct the jury in every case in which it gave instructions that "they are the judges of the law and that the court's instructions are advisory only."

408. *See, e.g.*, Hamilton v. State, 12 Md. App. 91, 277 A.2d 460 (1971), *aff'd*, 265 Md. 256, 288 A.2d 885 (applying the advisory-law provision).

409. There is no public contention that I can find, or unpublished contention of which I am aware, suggesting that *In re Winship* had imperiled the validity of the advisory-law provision.

410. *See, e.g.*, State v. Howard, 564 N.W.2d 753 (Wis. 1997). In *Howard*, the Wisconsin Supreme Court applied its "sufficient reason" exception to the waiver doctrine under the Wisconsin version of the UPCPA to excuse the failure of Howard's lawyers to foresee a subsequent interpretation of a state statute. *Id.* at 762. It considered and rejected the State's argument that "Howard had available to him all of the statutes, legislative history, and the rules of statutory construction" that the later party who was successful had available to him. *Id.* The *Howard* court held that the subsequent interpretation of the statute was not reasonably foreseeable, and said: "To hold otherwise would require criminal defendants and their counsel to raise every conceivable issue on appeal in order to preserve objections to rulings that may be affected by some subsequent holding in an unrelated case." *Id.*

which the advisory-law instruction likely infected the rest of the instructions and the extent to which it likely did not do so.[411] This might provide a principled basis for honoring both the fairness and finality principles.

V. CONCLUSION

The Maryland General Assembly and Maryland's appellate courts have developed a coherent body of collateral remedies.

The PCPA is the primary remedy.[412] It has a broad substantive scope: a petitioner can challenge a conviction or sentence if it is based, inter alia, on a violation of the federal or state constitutions or of a law of the state.[413] It guarantees first-time petitioners appointment of counsel (if they are indigent) and a hearing.[414] I argue that the PCPA also authorizes courts to order limited discovery, especially by deposition, so that the parties can present evidence in forms that the court believes are "convenient and just."[415] In addition, the PCPA has a flexible, fact-sensitive reopening provision ("in the interests of justice").[416]

State habeas corpus complements the PCPA remedy.[417] It is an important means to challenge state actions that a detainee cannot reach through the PCPA. This includes actions that illegally extend a period of otherwise valid incarceration (e.g., through errors in calculating sentences or earned "good conduct time"),[418] illegally reimpose incarceration (e.g., by wrongfully revoking a prisoner's release on mandatory supervision or parole), or change the rules after a sentence has been imposed (e.g., by retroactively requiring the governor to approve parole).

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411. From my review of the advisory-law instructions in a number of cases, I believe it is possible to identify: (1) cases in which the advisory-law instructions were categorical, pervasive (given repeatedly), and close in time to burden-of-proof, standard-of-proof, privilege-not-to-testify, and other core instructions (thereby, effectively nullifying those instructions); (2) cases in which there was a perfunctory advisory-law instruction, which the judge effectively overrode with categorical and separate burden-of-proof, standard-of-proof, privilege-not-to-testify, and other core instructions; and (3) cases in between these two poles. A court might find that the first category satisfies the prejudice test and the second does not, while sorting out the third category on a case-by-case basis.

412. *See supra* Part III.C.

413. MD. CODE ANN., CRIM. PROC. § 7-102 (2004).

414. *Id.* § 7-108.

415. MD. R. 4-406(c); *see supra* Part IV.A.

416. CRIM. PROC. § 7-104.

417. *See supra* Part III.A.

418. "Good conduct time" allows an inmate to deduct a certain amount of his sentence by exhibiting good conduct. *See* Woods v. Steiner, 207 F. Supp. 945, 947-48 (D. Md. 1962) (describing generally how "good conduct" time is awarded).

In addition, a prisoner can challenge the legality of his conviction or sentence by habeas corpus, as he can through the PCPA, but there are powerful disincentives to do so that preserve the central role of the PCPA.[419]

A convicted defendant, by motion filed in the original criminal case, can challenge an illegal sentence at any time.[420] In noncapital cases, a court can grant relief "ordinarily . . . only where there is some illegality in the sentence itself or where no sentence should have been imposed."[421] However, Maryland's courts have construed this principle flexibly; e.g., to review a claim that a court erred in imposing a life sentence that was authorized for the crime, but without realizing it had discretion to suspend all or part of that sentence, and therefore without exercising that discretion.[422] In capital cases, the scope of the motion is broader. A petitioner may assert constitutional errors that "may have contributed to [a] death sentence, at least where the allegation of error is partly based upon a decision of the United States Supreme Court or of [the Maryland Court of Appeals] rendered after the defendant's capital sentencing proceeding."[423]

In recent years, Maryland has given some prisoners expanded opportunities to assert claims based on newly discovered evidence that substantially demonstrates that they are innocent, including death-sentenced prisoners and other prisoners who can demonstrate this through scientific, especially DNA, evidence.[424]

If, however, Justice Frankfurter was right that "[t]he history of American freedom is, in no small measure, the history of procedure,"[425] then the assessment of the PCPA is mixed. Its procedural default provisions, as construed, fairly protect a narrow category of claims based on "fundamental rights," while providing little protection to the remainder of claims. In the latter respect, attorneys inadvertently "waive" these claims for their unsuspecting clients when they fail to preserve those claims at trial and on appeal. Their actions and omissions often are negligent, but fall short of actionable ineffective assistance of counsel, and sometimes are competent, but not prescient. These comprise the vast majority of attorney errors.[426]

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419. *See supra* Part III.A.

420. *See supra* Part III.B.

421. Evans v. State, 382 Md. 248, 278-79, 855 A.2d 219, 309 (2004).

422. State v. Chaney, 375 Md. 168, 825 A.2d 452 (2003).

423. *Evans*, 382 Md. at 279, 855 A.2d at 309.

424. *See supra* Part IV.C.2.

425. Malinski v. New York, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring).

426. *See supra* Part III.C.1.h.

I make several suggestions about how courts might respond to these problems by more fully enforcing the current provisions of the PCPA, including: (1) a provision that authorizes a court to excuse waiver when a petitioner demonstrates "special circumstances" that justify excuse;[427] and (2) a provision that authorizes a court to reopen a postconviction proceeding when it is "in the interests of justice" to do so.[428] I argue that these provisions authorize postconviction courts to recognize "freestanding" and "gateway" claims of innocence,[429] as appellate courts in other states have done, and to excuse an attorney's failure to preserve a claim based on a subsequent and reasonably unforeseeable development in the law.[430]

I offer two case examples in support of my arguments. In the Michael Austin case, the Circuit Court for Baltimore City accepted and applied the gateway theory of innocence to reopen prior postconviction proceedings and provide postconviction relief to the petitioner. I argue this decision was correct.[431] In a hypothetical—a composite based on a number of actual cases—I argue that Maryland's courts should excuse the failures of Maryland's lawyers to object to the old instruction that juries were judges of the law as well as of the facts. I explain why I think the "special circumstances" and "interests of justice" provisions of the PCPA support this conclusion.[432]

I make my arguments against the background of the retrenchment in federal habeas corpus. I believe, quoting Justice O'Connor, that "the principal benefit of the federalist system is a check on abuses of government power."[433] I believe that if there is "a healthy balance of power between the States and the Federal Government," it "will reduce the risk of tyranny and abuse from either front."[434]

The understanding that state courts can and should act as a check on the federal courts, and that this role inheres in the federal separation of powers doctrine, is part of "[b]oth constitutional history and theory."[435] It was state courts, after all, not Chief Justice John

427. *See supra* Parts III.C.1.h, IV.C.2.
428. *See supra* Parts IV.B, IV.C.2.
429. *See supra* Part IV.C.2.a.
430. *See supra* Part IV.C.2.b.
431. *See supra* Part IV.C.2.a(2).
432. *See supra* Part IV.C.2.b.
433. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).
434. *Id.*
435. A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 935 (1976); *see* United States v. Miller, 425 U.S. 435, 454 (Brennan, J., dissenting) (commenting on, and encouraging the "emerging trend among high state courts of relying upon state constitutional protections of individual liberties").

Marshall, who first developed the doctrine of judicial review.[436] Before the Civil War, "antislavery lawyers adopted a forceful states' rights stance" to challenge the fugitive slave laws.[437] In short, consistently throughout our history, state courts have read their own constitutions to recognize and protect rights in ways that supplement and occasionally depart from Supreme Court rulings,[438] and that tradition continues.[439]

I believe there is no more important time than now, and no more important area than the collateral process, in which our state courts can play this vital role.

436. *Howard, supra* note 435, at 877-78.

437. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 111 (1977).

438. *See generally Howard, supra* note 435.

439. Robert Williams, *Foreword: Symposium on Tomorrow's Issues in State Constitutional Law*, 38 VAL. U. L. REV. 317 (2004).